



REPUBLIC OF KENYA



**In re Estate of Jason Mungai Kamau (Deceased) (Civil Appeal 101 of 2022)  
[2023] KEHC 22931 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 101 OF 2022  
LM NJUGUNA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**TERESIA MUGURE MUNGAI ..... APPELLANT**

**AND**

**GODFREY NJOGU KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**HUMPHREY NG'ANG'A KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**FLORENCE WAMBUA KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**GRACE WAMBUI KAMAU ..... 4<sup>TH</sup> RESPONDENT**

**GEOFFREY MUNGAI KAMAU ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal from the Ruling of Hon. Cheruto C. Kipkorir PM delivered in Kerugoya Chief Magistrate's Court Succession Cause No. E494 of 2021 on 09th November 2022)*

**JUDGMENT**

1. The appellant filed a memorandum of appeal being dissatisfied with the decision of Hon. Cheruto C. Kipkorir PM delivered in Kerugoya Chief Magistrate's Court Succession Cause No. E494 of 2021 on 09<sup>th</sup> November 2022 seeking orders that:
  - a. This court allows the appeal and sets aside the decision of the honourable trial magistrate,
  - b. This court issues restraining orders restraining the respondents by themselves or their servants of agents from intermeddling with the estate of the deceased namely Mutira/Kanyei/2xx; and
  - c. Costs of this appeal be to the appellant.
2. The grounds of the appeal are that the honourable trial magistrate erred in law and fact by:



- a. Determining issues of ownership of assets of the deceased without jurisdiction;
  - b. Making a finding without jurisdiction, that the appellant was only entitled to the share belonging to the deceased in property Mutira/Kanyei/2xx which is the only portion that can be subject to Kerugoya Chief Magistrate’s Court Succession Cause No. E494 of 2021;
  - c. Misconstruing the prayers sought;
  - d. Misinterpreting the orders in Kerugoya Chief Magistrate’s Court Succession Cause No. 63 of 1987 dated 05<sup>th</sup> November 2010 as final orders yet the issue of ownership of Mutira/Kanyei/2xx was to be concluded by a succession court in the matter of the estate of George Kamau Kihara (Deceased);
  - e. Ignoring the superior court’s orders, which orders are binding on lower courts, wherein the issue of ownership of Mutira/Kanyei/2xx has been conclusively determined by consent of the parties;
  - f. Failing to consider the appellant’s written submissions;
  - g. Considering extraneous matters thereby arriving at a wrong decision; and
  - h. Misinterpreting the holding in the case of In *Re Estate of Stone Kathuli Muinde (deceased) [2016]* eKLR whose essence was property of the deceased as against third party, which was not appropriate in determining issues of intermeddling.
3. The impugned ruling relates to an application dated 05<sup>th</sup> August 2022 filed under certificate of urgency, seeking orders that the respondent and/or their agents, servants or proxies be restrained from alienating, selling, offering for sale, offering for lease, transferring, cultivating, leasing trespassing and/or dealing in any way whatsoever with and or interfering with parcel known as Mutira/Kanyei/2xx pending hearing and final determination of the petition. The grounds of the application were that the applicant is the administrator of the estate of the deceased vide grant of letters of administration issued on 06<sup>th</sup> December 2021 and that it is her responsibility to protect the estate from intermeddling. The arguments were further detailed in the supporting affidavit to this application.
  4. The respondents opposed the said application through a replying affidavit dated 29<sup>th</sup> August 2022 stating that they are all step-brothers and step-sisters of the deceased who was the registered owner of land title number Mutira/Kanyei/2xx. That they had been using the said land for many years as directed by their parents until the death of their father, George Kamau Kihara. That vide Kerugoya SPMCC No. 63 of 1987, the deceased sought to evict the respondents herein from the said land. That the respondents filed a counterclaim stating that the land was being held in trust for them by the deceased.
  5. That the court found in favor of the respondents regarding the counterclaim and a declaration was made that the deceased holds the property in trust for himself and the respondents. That the court vide decree dated 05<sup>th</sup> September 2012 ordered that the suit land be shared amongst the 4 wives of the deceased, George Kamau Kihara. A copy of the said decree was enclosed in the reply. The respondents further claimed res judicata in view of the findings of the court in Kerugoya SPMCC No. 63 of 1987.
  6. In the appellant’s supplementary affidavit dated 02<sup>nd</sup> September 2022, she averred that the land title number Mutira/Kanyei/2xx was not part of the estate of George Kamau Kihara (deceased) and the same was excluded from his estate during succession vide High Court at Nairobi Succession Cause No. 406 of 1987. That the suit land is the only asset subject to succession in the estate of the deceased herein. That the parties in the succession cause entered a consent which culminated into an order that the



- property Mutira/Kanyei/2xx be excluded from the estate of George Kamau Kihara (deceased). Copies of proceedings and the various orders in the Nairobi succession cause were annexed to this affidavit.
7. The parties herein filed their respective submissions as directed by the court.
  8. The appellant in her submissions stated that the trial magistrate declined to issue orders that would allow the appellant to preserve the estate of the deceased and prevent intermeddling. She cited the cases of *East African Industries v Trufoods (1972) EA 420*, *Giella v Cassman Brown & Co. Ltd (1973) EA* and *Nguruman Limited v Jan bond Nielsen & 2 others [2014] eKLR*. It was her case that section 47 of the *Law of Succession Act* gives power to the court to make such orders as it deems fit while paying attention to the jurisdiction of the various courts. That the trial court erroneously purported to determine issues of ownership of the subject property, an issue that is outside its jurisdiction. That the issue of distribution of the estate was also not before the trial court but the same was erroneously determined, basing its findings on inappropriate caselaw.
  9. On their part, the respondents submitted that the trial court, in fact, did not determine the issue of ownership but suggested that the same be placed before a court with the relevant jurisdiction. That the trial court merely referred to the previous orders of the court issued in 2010 and 2012 and that there is no merit on this ground of appeal. That the trial court recounted the events of the counterclaim raised in 1987 where the suit land was to be held in trust by the deceased for himself and the respondents, but he did not go into the merits of determining ownership. That the case herein and the one in *Kerugoya SPMCC No. 63 of 1987* are very different causes of action. That similarly, the Nairobi matter is also on a different subject matter and so the trial court cannot be said to have disregarded a superior court's findings.
  10. That the court indeed considered all the submissions in making its findings and not extraneous issues. That the ruling herein was relating to an interlocutory application only but the appellant has included extraneous issues in her appeal. That the totality of the prayers sought by the lower court was to restrain the respondents from using the suit land howsoever, but the court dismissed this application. That the appellant's prayers sought in *Kerugoya SPMCC No. 63 of 1987* for eviction of the respondent, but the court failed to grant them. That the appellant herein is barred under section 7 of the *Civil Procedure Act* from bringing a similar issue before this court by reason of res judicata. On the allegation of intermeddling, the respondents submitted that the appellant's late husband was ordered to hold the property in question in trust for himself and the respondents. That he cannot claim complete entitlement to the same but only a share. Therefore, the court's interpretation of In *Re Estate of Stone Kathuli Muinde (deceased) [2016] eKLR* is correct and he urged the court to dismiss the appeal with costs.
  11. I have considered the grounds of appeal and the submissions by the parties. In my view, the issue for determination is:
    - a. Whether the application dated 05<sup>th</sup> August 2022 was barred by res judicata in light of *Kerugoya Chief Magistrate's Court Succession Cause No. 63 of 1987* and *High Court at Nairobi Succession Cause No. 406 of 1987*.
  12. The application which was determined through the impugned ruling is a standard interlocutory application. However, the suit land was also the subject in both *Kerugoya Chief Magistrate's Court Succession Cause No. 63 of 1987* and *High Court at Nairobi Succession Cause No. 406 of 1987*. The latter was succession proceedings regarding the estate of the father of the deceased herein. When the issue of the estate of the deceased arose, Honourable Lady Justice Aluoch (now retired) issued orders (by consent of the parties) dated 20<sup>th</sup> April 1989, excluding the suit property herein from the estate



of the deceased therein. These orders were reiterated by Honourable Justice Kuloba (now retired) through an order dated 18<sup>th</sup> March 1999.

13. An order/decreed dated 05<sup>th</sup> September 2012 following determination of Kerugoya Chief Magistrate's Court Succession Cause No. 63 of 1987 where the court entertained the suit whose subject matter was the same property no. Mutira/Kanyei/2xx. The plaintiff had filed an application similar to the one herein and the defendants filed a counterclaim. The court while ruling in favour of the defendants, Honourable E.M. Nyaga, Resident Magistrate ordered that the suit property be held in trust by the plaintiff therein, who is the deceased herein, and that the property be held in trust by the plaintiff on behalf of himself and the defendants therein. I cannot tell whether or not the court in this matter was made aware of the proceedings in High Court at Nairobi Succession Cause No. 406 of 1987.
14. Given the foregoing, on the issue of whether or not the application dated 05<sup>th</sup> August 2022 was barred by res judicata, in my view that answer is in the affirmative. Section 7 of the [Civil Procedure Act](#) provides as follows:

“

“7. Res judicata

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.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

15. Even though I do not have the benefit of having perused the court record in Kerugoya Chief Magistrate's Court Succession Cause No. 63 of 1987, I can see that the decree of the court outlines the prayers sought by the parties in the main claim and in the counterclaim. The court ended up finding in favour of the counterclaimants. The parties are the same except the plaintiff therein who is the deceased herein has since been substituted by his wife, the appellant herein. The second defendant has also been substituted by the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein. The issues determined by the court are similar in both cases and the former court heard and determined them albeit as a conduit to assist in



the determination of another ongoing suit involving the same parties. The magistrate in that case had jurisdiction accorded under Section 47 of the [Law of Succession Act](#) states that:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders thereto as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

16. In the case of The [Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, \[2017\] eKLR](#), the court held:

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- 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.”

1. In the case of [Lal Chand Vs Radha Kishan, AIR 1977 SC 789](#) it was stated that;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

18. It is prudent to note at this point that the court’s decision which is the subject of this appeal did not endeavour to determine ownership of the property. Rather, the honourable magistrate simply pointed the parties to the Environment and Land Court because the final determination of the case will lie in finding out who the legitimate owner of the land is and how it was acquired. The magistrate relied on the decision of Justice Musyoka in the case of In [Re Estate of Stone Kathuli Muinde \(deceased\)](#) (2016) eKLR in making his case that he need not determine ownership of the suit land.

19. It is true that the orders in Kerugoya Chief Magistrate’s Court Succession Cause No. 63 of 1987 and High Court at Nairobi Succession Cause No. 406 of 1987 have not been subjected to any review or appeal, as the case may be. Even in the latest application, this issue has not arisen. There is a chance that the parties herein will continue running circles around the court system to their disadvantage, noting that the law and jurisprudence are growing at a fast rate. The appellant herein may not be able



to achieve her goal until the issue of ownership of the suit property has been resolved, which issue will be sufficiently addressed before the Environment and Land Court.

20. In the upshot, I do find that the appeal lacks merit and the same is hereby dismissed with no order as to costs.

**DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondents

