



**Kotikash & another (Both Suing as the Duly Appointed Legal Administrators to the Estate of the Late Saitabau Kotikash) v Ngwata (Environment and Land Appeal E003 of 2021) [2023] KEELC 18321 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

**CG MBOGO, J**

**JUNE 27, 2023**

**BETWEEN**

**JENIFFER KOTIKASH ..... 1<sup>ST</sup> APPELLANT**

**MOSES KOTIKASH ..... 2<sup>ND</sup> APPELLANT**

**BOTH SUING AS THE DULY APPOINTED LEGAL ADMINISTRATORS TO  
THE ESTATE OF THE LATE SAITABAU KOTIKASH**

**AND**

**NAIYEYO NGWATA ..... RESPONDENT**

*(Being an appeal from the judgment and consequential orders in Chief Magistrates' Court at Narok in Civil Case No. 171 of 2018 Jennifer Kotikash & another v Naiyeoyo Ngwata delivered on 30th March 2021 by Hon G.N. Wakabiu (CM))*

**JUDGMENT**

1. The appellants herein being dissatisfied and aggrieved by the whole of the judgment and subsequent orders of Honourable GN Wakabiu delivered on March 30, 2021 appeals to this court vide a memorandum of appeal dated April 28, 2021 against the whole judgment on the following grounds: -
  1. That the learned trial magistrate erred in law and in fact in awarding parcel No CisMara/Suswa-Kitet/21 to the respondent and effectively depriving the estate of the late Saitabau Kotikash, the lawful allottee the suit property.
  2. That the learned trial magistrate fatally misconceived the facts when he held that the suit is *res judicata* yet parcel No CisMara/Suswa-Kitet/21 was not the subject matter in ELC Suit No 1083 of 2003- Masaiyo Ole Pelela & 3 Others v Suswa Kitet Group Ranch.



3. That the learned trial magistrate failed to appreciate that the Kepua Ole Ngweta was allotted parcel No CisMara/Suswa/ Kitet/ 17 in compliance with the consent recorded in ELC Suit No 1083 of 2003-Masaiyo Ole Pelela & 3 others v Suswa Kitet Group Ranch.
  4. That the learned magistrate failed to appreciate that the late Saitabau Kotikash as a bona fide member of the group ranch was not allotted any other parcel except plot No 522 now CisMara/ Suswa-Kitet/21 later registered in the name of the 1<sup>st</sup> appellant, his widow.
  5. That the learned magistrate erred in law and fact in putting reliance and credence on the testimony of the respondent which evidence contradicts and not in tandem with the records held by the Adjudication Committee.
2. The appellants therefore pray that the appeal be allowed with costs to the appellants and the judgment and subsequent orders against the appellants be set aside.
  3. On March 27, 2023 and in the presence of both parties, this court directed that the appeal be canvassed by way of written submissions. The appellants filed their written submissions dated May 12, 2023 on May 31, 2023.
  4. The appellants raised three issues for determination as follows: -
    1. Whether the suit before the trial court was *res judicata*.
    2. Whether the learned trial magistrate was *functus officio* on the issue of *res judicata* at the time of delivering his judgment on March 30, 2021.
  3. Whether the estate of the late Saitabau Kotikash is the right owner of the parcel number Suswa/ Kitet/21.
  5. On the first issue, the appellants submitted that in order for the trial to have considered whether the case was *res judicata*, it ought to have looked at the decision that claimed to have settled the issues in question and the entire pleadings in Nairobi ELC Suit No 1083 of 2003- Masayio Ole Pelela & 3 Others v Suswa/Kitet Group Ranch and the instant case (subject of the appeal). Further, that the suit property in Nairobi ELC Suit No 1083 of 2003 is parcel No Suswa Kitet/1 whereas the suit property in the trial court is parcel number Suswa/ Kitet/21 and that the parties herein are not the same parties in the former suit.
  6. The appellants further submitted that the 1<sup>st</sup> appellant's late husband and the respondent's late husband were not parties in ELC Suit No 1083 of 2003 and they were neither directly or indirectly involved in the case. In the former suit, the appellants submitted, the judgment was entered by consent which judgment did not indicate that the respondent, her father-in-law or the respondent's late husband were given ownership of the suit property being Suswa Kitet/21. As such, the issue of *res judicata* does not arise. The appellants relied on the case of [\*Christopher Kenyariri v Salama Beach\* \[2017\] eKLR](#).
  7. On the second issue, the appellants submitted that the trial court ventured into the issue of *res judicata* which matter had been ruled by his predecessor of concurrent jurisdiction and purporting to review his own ruling is tantamount to the trial court sitting on appeal on its own decision which could only be set aside or upheld by a superior court. Further, that once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. The appellants relied on the cases of [\*Telkom Kenya Limited v John Ochanda \(suing on his own behalf and on behalf of\*](#)



996 Former Employees of Telkom Kenya Limited [2014] eKLR and John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR.

8. On the third issue, the appellants submitted that the late Saitabau Kotikash was a member of the Group Ranch and was allocated parcel number 522 which is the suit property and the respondent's husband was allocated parcel number 17. Further, they submitted that the suit property duly allocated to the late Saitabau Kotikash was irregularly registered in the name of the 1<sup>st</sup> appellant and that the trial court would have held that the suit property reverts back to the estate of the late Saitabau Kotikash instead of depriving the estate of its share leaving the beneficiaries landless and destitute. Reliance was placed in the case of Josphat Kuria Gathoni v James Maina Njoroge & 3 Others [2019] eKLR.
9. The respondent did not file written submissions. Be that as it may, I have considered the grounds of appeal, the written submissions filed by the appellants and the authorities cited therein. This court will proceed to determine the issues as raised by the appellants.
10. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in Mwanasokoni v Kenya Bus Service Ltd [1982 – 88] I KAR 278. In addition, this court must also take into account the fact that it did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – Selle & another v Associated Motor Boat Co. & others [1968] EA 424.
11. The appellants herein filed an amended plaint dated August 29, 2018 before this court in ELC Suit No 566 of 2017 seeking the following orders: -
  - aa. An order of the eviction of the defendant from the suit land being Land Reference Number Cis Mara/Suswa Kitet/21, damages, compensation for all actions taken by the defendant in relation to the developing and interfering with the plaintiffs' portion of land and his attempt to dispossess the plaintiffs.
  - bb. An order of permanent injunction restraining the defendant by herself, her personal assigns, servants and/ or agents from entering, developing, transferring, reallocating, allocating or dealing in any way with all that parcel of land known as Land Reference Number Cis Mara/Suswa Kitet/21.
  - c. The plaintiffs further seek orders for special damages for injuries sustained by the deceased on February 22, 2008.
  - d. An order for the Officer in Charge of the Police Station (OCS) Narok to ensure that these orders are fully complied with.
  - e. Costs of the suit.
  - f. Such further relief this court may deem fit and just to grant.
12. On October 17, 2018 and before my brother Kullow, J, the court noted that the suit falls within the jurisdiction of the Magistrates' Court and transferred the same to the Magistrates' Court for hearing and determination.
13. The respondent filed an amended statement of defence and included a counter claim dated January 28, 2019. In the counter claim, the respondent sought the following orders: -



- a. The plaintiff's plaint be dismissed with costs.
  - b. An order of mandatory injunction compelling the 1<sup>st</sup> plaintiff, whether by herself, agents, servants and/ or any other persons whosoever, to forthwith vacate the defendant's parcel of land.
  - c. That title number Cis Mara/Suswa Kitet/21 be declared void ab initio.
  - d. An order of enforcement of a decretal order by consent of 22<sup>nd</sup> of July 2016 in the High Court ELC Suit No 1083 of 2003 be forwarded to the adjudication officer for implementation.
  - e. Costs of this suit.
  - f. Any other or further relief which this honourable court may deem fit to grant.
14. A perusal of the record of appeal and the proceedings indicate that the matter proceeded for hearing before the trial court on September 8, 2020 and the 2<sup>nd</sup> appellant testified whereupon the plaintiffs' case was closed. It was the 2<sup>nd</sup> appellants testimony that in the year 1995, Suswa Kitet Group Ranch was dissolved and in the year 2000, the late Saitabau Kotikash was given a beacon certified and shown his land and that 8 years later, the respondent tried to invade the suit property and assaulted the deceased. That a meeting was held and which meeting he was present and, it was resolved that, the suit property belonged to the deceased. That the minutes of the said meeting was part of his list of documents.
  15. The 2<sup>nd</sup> appellant further testified that the respondent's late husband filed a case at the Milimani law courts in ELC No 192 of 2008 which was dismissed for lack of merit. In cross examination, the 2<sup>nd</sup> appellant testified that their families are divided by a road and the 1<sup>st</sup> appellant never invaded the respondent's land. The 2<sup>nd</sup> appellant informed the court that the respondent's late husband was not a member of the Group Ranch. With regard to the grant, the 2<sup>nd</sup> appellant testified that the title to the suit property was issued on December 8, 2017 and that they did not know if the grant issued in Succession Cause No 914 of 2014 was temporary and limited and which did not authorise him to cause the land to be registered in their names.
  16. The respondent's case proceeded for hearing on November 24, 2020. Kapue Ole Ngeta (DW1), the respondent's father-in-law testified that they filed a case in Milimani HCCC No 1083 of 2003 and they agreed that each person should get 30 acres. It was also the evidence of Kapue Ole Ngeta (DW1) that the committee and the appellants brought a letter demanding that he gives vacant possession and he could not oblige since they had a case at the High Court since the appellants had been given the title fraudulently by the committee. Also, that HCCC 192 of 2008 was withdrawn after the respondent proposed settlement.
  17. During cross-examination, DW1 testified that he did not know if he was member number 1662 in the register of the Group Ranch but acknowledged that members were shown their respective portions and titles given. DW1 did not know if the deceased got beacon certificate for plot 522 but the informed the court that the committee did not give him the beacon certificate. DW1 further testified that his son was buried on his brother's land and not in the suit property.
  18. It appears that as per the proceedings, the said DW1 contradicted himself by stating that he only had one land which is the suit property and also testified that he lives in a neighbouring land and admitted to having his own land and the 1<sup>st</sup> appellant her own land.
  19. With regard to the meeting held on April 15, 2008, DW1 testified that he was not there and the resolutions in the meeting were false. With regard to the counter claim, DW1 testified that he had no evidence that the suit land was his but has neighbours who are witnesses and whom he was not told



- to bring to court. It was also his evidence that the late Saitabau Kotikash was brought from elsewhere and allocated land but could not tell when the deceased was brought.
20. DW1 further testified that he does not know how the 1<sup>st</sup> appellant acquired title to the suit property and if his case should be against the officials of the Group Ranch. With respect to ELC Suit No 1083 of 2003, DW1 testified that they filed a consent to withdraw the suit vide decree dated July 22, 2016. Further, that he does not know that the deceased was member No 6816 of the Group Ranch and that he does not have evidence to show that his son was a member of the Group Ranch.
  21. The trial court delivered judgment in the matter which is the subject of this appeal. In dismissing the appellants' suit with costs to the respondent and in upholding the respondent's counter claim, the trial court made the following conclusion as listed herein below: -
    1. That after the court heard evidence it became clear that the parties although the parties herein seem to be different from the parties in ELC Suit No 1083 of 2003 Masayio Ole Pelela & 3 Others v Suswa Kitet Group Ranch the court was of the opinion that the parties in this case were direct beneficiaries and successors in title of ELC Suit Number 1083 of 2003 Masayio Ole Pelela & 3 Others versus Suswa Kitet Group Ranch and hence they are also bound by the orders and judgment in ELC Suit Number 1083 of 2003 Masayio Ole Pelela & 3 Others versus Suswa Kitet Group Ranch.
    2. Since the parties herein are bound by the orders and judgment in ELC Suit Number 1083 of 2003 Masayio Ole Pelela & 3 Others v Suswa Kitet Group Ranch and the issues raised in this suit were sustainably and finally determined in that suit, this suit is therefore *res judicata*.
    3. The 1<sup>st</sup> plaintiff obtained title to the land without having undergone the full process of obtaining a grant and a confirmation of that grant of letters of administration, and therefore the title she is holding was unlawfully obtained.
    4. The 1<sup>st</sup> plaintiff having obtained the title she is holding illegally, cannot enjoy the protection of property under Article 40 of the [Constitution of Kenya, 2010](#) and therefore the plaintiffs are not entitled to the reliefs sought in the plaint.
    5. The defendants are entitled to the reliefs sought in the counterclaim.
    6. The defendants are the ultimate winners and therefore the plaintiffs should bear the costs of this suit and the counter claim.
  22. The role of this court at this stage and in a bid to determine the issues as raised by the appellants, will be to check whether the trial court in arriving at its decisions properly applied the law or misunderstood or misapprehended the law vis a vis the facts of the case and the evidence tendered before it.
  23. On whether the suit before the trial court was *res judicata*, the trial court was of the opinion that the parties herein are bound by the orders and judgment in ELC Suit No 1083 of 2003 Masayio Ole Pelela & 3 others v Suswa Kitet Group Ranch by virtue of being direct beneficiaries and successors in title.
  24. Section 7 of the [Civil Procedure Act](#) provides for the ingredients of *res judicata* which states that: -

“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.”



25. The *Civil Procedure Act* has also provided explanations with respect to the application of the *res judicata* rule. Explanation 1-6 are in the following terms:

“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.”

26. 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.”

27. I have perused the record and a look at the decree issued on July 22, 2016 with respect to ELC Suit No 1083 of 2003 show that the parties before court were Masayio Ole Pelela as the 1<sup>st</sup> plaintiff, Masampe Ole Pere as the 2<sup>nd</sup> plaintiff, Philip Ole Nkukuu as the 3<sup>rd</sup> plaintiff and Kepue Ole Ngweta as the 4<sup>th</sup> plaintiff and Suswa/Kitet Group Ranch as the defendant (this defendant’s number was not indicated). In this case, the subject matter of the suit was Suswa/ Kitet/1. As it can be seen from the decree, both parties entered into a consent that was adopted as an order of the court on 8<sup>th</sup> February, 2016.

28. In comparison of the instant appeal with ELC Suit No 1083 of 2003, I do note that the issues in the former suit are not similar. The claim in ELC Suit No 1083 of 2003 was for injunction with respect to Suswa/ Kitet/1, a declaration that allocation to non-members was illegal, null and void, request for full and true accounts of all moneys received and paid by the Group Ranch, repetition of the process of subdivision and allocation so that group members get equal shares. In the suit before the trial court, the claim was for eviction, injunction, special damages, security enforcement and costs as listed in paragraph 11 of this judgment. More importantly, the subject of the suit was Land Reference Number



- Cis Mara/ Suswa Kitet/ 21. The parties in the suit are not similar either to the parties in ELC Suit No 1083 of 2003.
29. More importantly, ELC Suit No 1083 of 2003 did not grant the parties therein the benefit of being heard and a determination pronounced. By this I mean that parties were not subjected to trial. My analysis of the above is that the suit before the trial court was not *res judicata* for the reason that it did not meet the requirements as provided under Section 7 of the *Civil Procedure Act*. In addition, the conclusion that the parties herein are bound by the orders and judgment in ELC Suit No 1083 of 2003 is far-fetched and unreasonable.
  30. On whether the learned trial magistrate was *functus officio* on the issue of *res judicata* at the time of delivering his judgment on March 30, 2021, it was the appellants submission that the issue was determined by his predecessor and therefore in determining that the suit was *res judicata* was tantamount to sitting on its own appeal. A perusal of the record show that the respondent filed a preliminary objection on 16<sup>th</sup> and October 18, 2018 challenging the suit on the grounds that the trial court lacks jurisdiction to hear the matter as it is *res judicata*.
  31. The trial court vide a ruling delivered on 10<sup>th</sup> December 2019 arrived at the finding that “this suit cannot be said to be *res judicata*”. This ruling was delivered by the Hon. Wakahiu who heard both parties and finally gave his verdict. It defeats logic and I fail to understand why the said trial magistrate who found the suit not to be *res judicata* and dismissed the preliminary objection with costs, later changed his mind and later formed the opinion that the suit is *res judicata*. Indeed, this is tantamount to the trial court sitting on its own appeal. The trial court without any formal or oral application reviewed his own finding in the final judgment which this court finds to be unprocedural.
  32. On whether the estate of the late Saitabau Kotikash is the right owner of the parcel number Suswa/ Kitet/21, I have analysed the evidence and the testimony of the witnesses as enumerated in paragraphs 14-20 above. In support of their case, the appellants produced a copy of certificate of title deed of the suit property, official search, copies of the beacon certificate, minutes of the meeting held and letters of complaints. On the other hand, the respondent’s witness appeared not to be aware that there were beacon certificates issued, any meeting held in a bid to resolve the dispute as he admitted not to have participated. His testimony was not backed by evidence as he admitted not to have any documentation to show that he is entitled to the suit property and neither his late son. He also appeared to have contradicted himself when he testified that the only land that he owns is the suit property whereas he claims to live on a different land.
  33. My analysis of the evidence and the documents produced before the trial court shows that the balance of probability tilted in favour of the appellants herein. However, the 1<sup>st</sup> appellant without following due process unlawfully caused the suit property to be registered in her name. I say so because in the absence of a certificate of confirmation of grant, there is no proof that she is the lawfully registered owner of the suit property. Having so found that the 1<sup>st</sup> appellant obtained the title without having undergone the full process of obtaining a grant and a confirmation of that grant of letter of administration, the trial court ought to have ruled that the title to the suit property reverted back to the estate of the deceased husband of the 1<sup>st</sup> appellant pending the confirmation or otherwise of the said grant. The trial magistrate therefore erred in law and fact.
  34. Arising from the above, the appeal herein is allowed save for costs which is to be denied to the appellants for procuring a title to the suit property unprocedurally and unlawfully. The judgment delivered on March 30, 2021 and the subsequent orders are hereby set aside. Each party to bear its own costs. It is so ordered.



DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 27<sup>TH</sup> DAY OF JUNE, 2023.

HON. MBOGO C.G.

JUDGE

JUNE 27, 2023.

In the presence of:

CA:T.Chuma

