



Kariuki (Suing as the adminstrate of the Estate of Sarah Wanjiku Magu Mbua (Nyamuiru)) v Muthoni & another (Sued as the administrators of the Estate of Muthoni Mbua Wangururo) (Environment & Land Case 691 of 2017) [2023] KEELC 18210 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18210 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 691 OF 2017

BM EBOSO, J

JUNE 9, 2023

BETWEEN

RUTH MUTHONI KARIUKI PLAINTIFF
SUING AS THE ADMINSTRATE OF THE ESTATE OF SARAH WANJIKU
MAGU MBUA (NYAMUIRU)

AND

PETER WANGURURO NDICHU 1ST DEFENDANT
JOHN MBUA MUTHONI 2ND DEFENDANT
SUED AS THE ADMINISTRATORS OF THE ESTATE OF MUTHONI MBUA
WANGURURO

RULING

1. The key issue to determined in this suit is whether the late Muthoni Mbua Wangaruro held land parcel numbers Githunguri/Kiairia/971, T35 and T38 in trust for the benefit of the late Sara Wanjiku Magu Mbua [Nyamuiru]. The plaintiff, Ruth Muthoni Kariuki, initiated the suit in her capacity as the administrator of the estate of the late Sarah Wanjiku Magu Mbua [Nyamuiru.] The three parcels of land were at all material times registered in the name of Muthoni Mbua Wangaruro [hereinafter referred to as “the deceased”]. Upon her death on December 10, 2005, the defendants in this suit, John Mbua Muthoni and Peter Wangaruro Ndichu, applied for a Grant of Letters of Administration in Nairobi High Court Succession Cause No 452 of 2012. The Succession Cause was subsequently transferred to Kiambu High Court and registered as Kiambu High Court Succession Cause No 20 of 2017. They listed the three parcels of land as part of the assets of the deceased. The High Court issued to the defendants a Grant of Letters of Administration.



2. The petition provoked an application dated 21/6/2013 by Ruth Muthoni Kariuki [the plaintiff in the present suit], seeking a revocation of the Grant. She, among other allegations, contended that the suit properties were held by the deceased in trust for her and others. It was the plaintiff's case in the High Court that the properties belonged to her late grandfather, the late Mbua Wangaruro, and were held by Muthoni Mbua Wangaruro in trust.
3. Upon hearing the application, the High Court (Musyoka J) rendered a ruling dated 20/1/2017 in which it made a definitive and conclusive finding to the effect that the suit properties were not held in trust and that they belonged to the late Muthoni Mbua Wangaruro as her absolute properties. Musyoka J rendered himself thus:
 - “7. The application before me is brought under Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Under that provision, a grant is liable to revocation where there are problems with the process of obtaining the grant, with administration and where the grant has become useless and inoperative. The applicant's principal case is that the estate of the deceased comprises of assets that formed the estate of her grandfather, and it should therefore be available, not only to the family of the deceased, but also to the other grandchildren of the applicant's grandfather. The argument is that the property was held in trust by the deceased for her siblings.
 8. I have stated above that there is no proof that the property in question ever belonged to the deceased. The papers placed on record do not bear the name of Mbua Wangaruro. Indeed, at demarcation it appears that the property was registered in the names of other individuals and it never came to the name of Mbua Wangaruro. In any event there is no averment as to the date of his death, or proof thereof. In short, there is no proof that the property was held in trust, which is the central plank in the applicant's case.
 9. I am not satisfied that a case has been made out for revocation of the grant herein. The application dated 21st June 2013 should be dismissed and I hereby dismiss the same. I shall not make an order as to costs.”
4. The plaintiff contends that she obtained leave to lodge an appeal in the Court of Appeal against the findings of Judge Musyoka. She further contends that she decided to bring the present suit because she believes that “a succession court is not seized with jurisdiction to determine any issue of trust”.
5. On October 19, 2018, Gacheru J rendered a ruling on the plaintiff's application dated 31/7/2017. Through the said application, the plaintiff had sought an interlocutory injunction against the defendant. Also considered in the same ruling was the defendant's notice of preliminary objection through which the defendants sought an order striking out this suit on the ground that the suit was res judicata by dint of the fact that the High Court had made the above findings and orders in the succession cause relating to the estate of Muthoni Mbua Wangaruro.
6. Upon hearing the preliminary objection and the application for injunction, Gacheru J held that although this suit is not res judicata, the issues raised in it are issues that this court was precluded against entertaining by dint of Section 6 of the *Civil Procedure Act*, given that the issues in the suit are to be



determined by the Court of Appeal in the intended appeal by the plaintiff. Gacheru J rendered herself thus:

“Therefore the court will have no option but to stay this suit until the intended appeal by the plaintiff is heard and determination.” (sic)

7. On the application for an interlocutory injunction, the Learned Judge declined to exercise jurisdiction on the ground that the issues raised in the suit were pending adjudication by the Court of Appeal. Ultimately, the Judge dismissed the defendants’ preliminary objection and stayed this suit until the plaintiff’s intended appeal is heard and determined.
8. Subsequently, on 26/9/2022, parties to this suit presented and recorded a consent reviewing Judge Gacheru’s Orders in the following terms’.

“By consent:

1. The plaintiff’s application dated 24/5/2022 be and is hereby allowed.
- (2) Costs in the cause”

9. The above consent was recorded following a notice of motion by the plaintiff, dated 24/5/2022, seeking a review of Judge Gacheru’s order of October 19, 2018. The consent effectively reviewed/ varied/ set aside the stay order which had been made by Gacheru J on October 19, 2018. The order had stayed proceedings in this suit, pending disposal of the plaintiff’s intended appeal in the Court of Appeal, challenging the findings and orders of Musyoka J.
10. With that, parties invited this court to consider and determine the following two rival applications: (i) the plaintiff’s application dated 31/7/2017 seeking interlocutory injunctive reliefs relating to the suit properties, pending the hearing and determination of this suit; and (ii) the defendants’ application dated 14/9/2022, seeking an order striking out this suit on the ground that the issue of trust which is the plank of the plaintiff’s claim was conclusively determined by Musyoka J in Kiambu High Court Succession Cause No 20 of 2017, hence the suit is res judicata.
11. The two applications fall for determination in this ruling. Because the defendant’s application dated 14/9/2022 raises a jurisdictional question, it will be disposed before the plaintiff’s application is disposed.
12. The defendants’ application dated 14/9/2022 was supported by an affidavit sworn on 14/9/2022 by John Mbuu Muthoni. He deposed that the plaintiff filed an application dated 21/6/2013 seeking revocation of the Grant issued in Nairobi High Court Succession Cause No 452 of 2012 (now Kiambu High Court Succession Cause No 20 of 2017) in which she invited the High Court to determine the question as to whether the suit properties were held by the late Muthoni Mbuu Wangaruro in trust for her two sisters. The defendants added that the High Court made a binding determination on the issue. Through their written submissions dated October 27, 2022, filed by M/s Gitau J H Mwarao & Company Advocates, the defendants contended that given the above determination by the High Court, this suit is res judicata and should be struck out.
13. The plaintiff opposes the application through her replying affidavit sworn on 28/9/2022 and written submissions dated 20/9/2022, filed by M/s J Makumi & Company Advocates. She admits that the High Court rendered the ruling dated 20/1/2017. She contends that “a succession court does not have jurisdiction to determine the issue of trust and Justice Musyoka’s decision having been made without jurisdiction really amounts to nothing and the issue of trust is now being prosecuted before this court



which is correctly seized with jurisdiction”. This is the gist of the plaintiff’s response on the issue of res judicata.

14. I have considered the application; the response to the application; and the parties’ rival submissions. The key issue which this court is invited to determine in the application dated 14/9/2022 is whether this suit is res judicata.
15. The court record before me reveals that the issue of res judicata was the subject of determination in a ruling rendered by Gacheru J on October 19, 2018. The ruling was in relation to the defendant’s preliminary objection dated 28/8/2017 and the plaintiff’s notice of motion dated 31/7/2017. This court [Gacheru J] rendered itself on the issue as follows:

“Is the Preliminary Objection merited?”

The Defendant/Objector has submitted that the suit herein is Res judicata since the Plaintiff’s claims to beneficial interest based on trust over the suit properties herein was decided by the court vide a Ruling delivered on January 20, 2017 by J Musyoka. She further alleged that there was no competent Appeal filed within the required time. Indeed, it is correct that the Plaintiff herein had filed Summons for Revocation of Grant in Succession Cause No.452 of 2012 now Kiambu Succession Cause No 20 of 2017. She had claimed beneficial interest based on trust over the suit properties herein. However, her claim was later dismissed by the court. However, the court has seen the Ruling delivered on November 30, 2017 whereby the Plaintiff was granted leave to appeal out of time against the Ruling delivered on January 20, 2017. Therefore, the issue of whether the Succession Cause had jurisdiction to deal with the issue of trust will be a subject of the stated Appeal. Though the suit is not Res judicata the issues raised herein are issues that will be canvassed in the intended Appeal. Allowing this suit to proceed won’t mean having two parallel proceedings over the issue of trust. The Court finds that since the Plaintiff has never been granted leave to Appeal, she should pursue the appeal to its logical conclusion as it deals with the same subject properties and the same parties.

Though the Court finds the suit not Res judicata, the Court finds that the suit falls under the purview of Section 6 of the Civil Procedure Act which states:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Therefore the Court will have no option but to stay this suit until the intended Appeal by the Plaintiff is heard and determination.”

16. From the above excerpt, it is clear that Gacheru J considered the issue of res judicata and made a finding on it. Instead of the defendants filing an appeal to challenge the above finding by Gacheru J, they decided to remain silent for a period of four years before resurrecting the same issue on the platform of the notice of motion dated 14/9/2022. Clearly, this is an abuse of the process of the court. The jurisdiction which the defendants are inviting this court to exercise is not available. If the defendants are dissatisfied with the finding of Gacheru J, they should pursue redress in the Court of Appeal.



17. The second limb of the application dated 14/9/2022 is a plea for an order vacating the ex-parte orders issued on November 22, 2019 in Kiambu CMC Misc Application No 19 of 2019. This court is not seized of Kiambu CMC Misc Application No 19 of 2019. The above relief can only be sought on the platform of the above Misc Application or on the platform of an appeal challenging the Chief Magistrate Court’s refusal to grant the relief. It is not available on the platform of this suit.
18. The result is that the defendant’s application dated 14/9/2022 is struck out for being an abuse of the process of the court. The defendant shall bear costs of the Application. I now turn to the plaintiff’s application dated 31/7/2017.
19. Through the application, the plaintiff seeks an interlocutory injunction prohibiting dealings in the suit properties pending the hearing and determination of this suit. The criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctions is well settled. The criteria was outlined in the case of *Giella v Cassman Brown* (1973) EA 358. First, the applicant is supposed to demonstrate a prima facie case with a probability of success. Second, the applicant is expected to demonstrate that unless the interlocutory injunctive relief is granted, he would stand to suffer injury that may not be indemnified through an award of damages. Third, if the court has doubts on both or either of the above, the application is to be determined on the basis of the balance of convenience. Lastly, at the stage of disposing the application for interlocutory injunctive relief, the court does not make definitive or conclusive findings on the key issues in the suit.
20. In the present application, the plaintiff swore a further supplementary affidavit dated 28/9/2022. She deposed at paragraph 8 of the affidavit that one Simon Kagiri Kinyanjui is one of the registered proprietors of the suit properties. She deposed thus:

“That by my application dated July 31, 2017 I am now seeking orders preserving this property as I later intend to move this court and amend my plaint where I will enjoin Simon Kagiri Kinyanjui who has alongside the defendant been issued with new titles where I will specifically pray that all the subsequent titles issued contrary to the orders in Kiambu Succession Cause No 20 of 2017 and this Thika ELC Case No 691 of 2017 be cancelled upon declaration of my mother trust.” [sic]
21. The fact that Simon Kagiri Kinyanjui is not a party to this suit and the plaintiff seeks injunctive orders relating to properties that the plaintiff contends are registered in Simon Kinyanjui’s name is one reason why the plea for an injunction cannot be granted. To grant an injunction against him without joining him as a party to the suit would be to condemn him unheard.
22. The second reason why this court does not think the plaintiff has made out a case for an interlocutory injunctive relief is that the plaintiff seeks the interlocutory injunction against a background where she has fully ventilated her claim in the High Court and the High Court has made a binding judicial determination on the merits of the claim. The decision was not in favour of the plaintiff. Further, while granting her an order enlarging the time for filing an appeal against the determination, the High Court (Ngugi J, as he then was) rejected her plea for an order of stay of execution of the ruling of 20/1/2017.
23. No evidence has been placed before this court to show that the findings of the High Court have been stayed or overturned by the Court of Appeal. In essence, the plaintiff wants this court to grant her orders that will contradict the findings and orders of the High Court. Were this court to grant the interlocutory injunctive orders while the findings and orders of the High Court still subsist, the Judiciary will be exposed to embarrassment and ridicule. I do not think a Judge of this Court properly directing his mind would do what the plaintiff is inviting this court to do.



24. This court and the High Court have equal status within the hierarchy of our court system. The High Court issued orders relating to the suit properties within the framework of the Law of Succession Act. Instead of the plaintiff pursuing the available appeal mechanism, she wants to procure parallel and contradictory orders from a court of equal status with the High Court.
25. I have no doubt in my mind that under the Court of Appeal Rules relating to injunctive reliefs and stay of execution, the plaintiff has a redress forum which she has, for reasons known to herself, failed to pursue. The court is constrained to emphasize that this court does not have jurisdiction to declare null and void findings and orders issued by the High Court.
26. Suffice it to state that, in the absence of evidence that the High Court orders dated 20/1/2017 have been set aside, overturned or stayed, I do not think the plaintiff can be said to have demonstrated a prima facie case with a probability of success. In my view, the balance of convenience favours maintenance of orderly administration of justice. It favours a situation where this court respects the subsisting definitive and conclusive finding and order of the High Court in relation to the suit properties.
27. For the above reasons, the plaintiff's notice of motion dated 31/7/2017 is struck out. The plaintiff shall bear costs of the application. The plaintiff will be at liberty to approach this court for an appropriate interlocutory relief should the Court of Appeal or the High Court set aside or review the subsisting High Court findings and decision of 20/1/2017.
28. In the end, the plaintiff's application dated 31/7/2017 and the defendant application dated 14/9/2022 are both struck out. Respective applicants to bear costs of the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the presence of:-

Mr Makumi for the Plaintiff

Mr Mwara for the Defendants

Court Assistant: Ms Osodo

