



Ndungu & another v Njuguna & another (Environment and Land Appeal 26 of 2021) [2023] KEELC 19104 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 26 OF 2021**

**JG KEMEI, J
JULY 28, 2023**

BETWEEN

PATRICK NDUNGU 1ST APPELLANT

WANJIRU NDUTA 2ND APPELLANT

AND

PATRICK NGANGA NJUGUNA 1ST RESPONDENT

FRANCIS MUNGAI WAMBURI 2ND RESPONDENT

(Appeal from the Ruling of Hon V Asiyo Senior Resident Magistrate delivered on the 22/2/2021 in MSC ELC NO 10 OF 2020 - Githunguri)

RULING

1. Vide a Memorandum of Appeal dated 22/3/2021 and filed on 24/3/2021 the Appellants being aggrieved with the Ruling of Hon. V. K. Asiyo, SRM delivered on 22/2/2021 in ELC OS 10 of 2020, proffered this appeal on the following grounds:-
 - a. The learned Magistrate misdirected himself in arriving at the conclusion that the matter was res judicata.
 - b. The Honourable Magistrate misapplied the law in dismissing the suit.
 - c. The Honourable Court failed to appreciate all the weighty evidence in the pleadings that tended to show that this matter is new, hence not res-judicata.
 - d. The Honourable Court disregard the law and/or facts in failing to appreciate the fact that the 1st Respondent in the case i.e Joseph Nganga Njuguna has never been taken to Court by any of parties herein and therefore to that extent the matter is not res-judicata.



2. The Appellants seek the following orders:-
 - a. That the Ruling of the trial Court delivered on 22/2/2021 be set aside and the matter set down for hearing interpartes.
 - b. Costs of the appeal be borne by the Respondent.
 - c. Any other relief as may be deemed fit and just.
3. On the 19/10/2022 parties elected to file written submissions with respect to the appeal. The Appellants submissions were filed through the firm of Kimani Kahete & Co. Advocates on 9/3/2023 while those of the Respondents were filed through the firm of Mbigi Njuguna & Co. Advocates on 1/3/2023.
4. The Appellants submitted that L.R No. Gatamaiyu/Kagwe/601 is family property in which the Appellants' mother was entitled to an equal share with her brother Wamburi Gatiti alias Waburi Gatiti who held the land in trust for the rest of the family members.
5. It was submitted that Wamburi Gatiti alias Waburi Gatiti could not have been the sole beneficiary of the suit property. The Appellants cited the provisions of section 38 of the Law of Succession Act which states as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
6. It was also submitted that going by the provisions of section 39 of the Law of Succession Act where the deceased left no surviving spouse or children the estate would devolve upon the kindred of the deceased in order of priority.
7. That in this case Wamburi Gatiti alias Waburi Gatiti held the land in trust for his other siblings amongst them the Appellants' mother. That the 2nd Respondent acquired an interest that was encumbered with trust in favour of his father's siblings. Furthermore, the Appellants have been in possession of the suit land having been borne and bred therein.
8. The case of Charles Moberai & 3 others vs. Joseph Mwita Mogeno & ano. ELC 621 of 1993 was cited in support of the appeal. In this case the Court held that the dispute of ownership of the property between the Plaintiffs and the Defendants remained unresolved in the Succession Court since the issue in the Succession Court was one of Revocation of Grant. The court was clear that post transmission disputes between the parties should be determined in the Environment and Land Court.
9. On the doctrine of res judicata the respondents relied on the provisions of section 7 of the Civil Procedure Act as follows:-

“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”
10. Black's Law Dictionary, 9th Edition describes *resjudicata* as; an issue that has been definitively settled by a judicial decision; an affirmative defence barring the same parties from litigating a second law suit



on the same transaction or series of transactions and that could have been but was not raised in the first suit.

11. The respondents submit that the suit before the trial Court was res judicata and the learned Hon. Magistrate did not misdirect himself in arriving at the conclusion that the matter is res judicata. In addition, it was submitted that the previous suit in Succ. No. 1442 of 2011 in the Estate of Wamburi Gatiti alias Waburi Gatiti between the appellants suit and the 1st respondent wherein the issue of their mother's claim of trust was determined. The Court found that the Appellants' mother had no claim over the suit land. In this case the Appellants' claim to the suit land was substantially and directly in issue and was determined in the Succession Cause No. 54 of 1996 as consolidated with Succession Cause No. 58 of 1996 where the Appellants mother being an Objector was found not to be a legal heir to the estate of the deceased registered owner of the property. What that meant is that the Appellants mother had no claim over the suit property. That the parties in this suit were the same as in the two succession causes with the exception of the first Respondent who purchased the said property from the 2nd Respondent in 2011 after all the disputes had been determined.
12. It is the submission of the Respondents that the issues raised in the trial Court and those in the Succession Causes are the same. The said succession causes have not been appealed, reviewed or set aside. That the issue of ownership therefore in the suit property is res judicata and the Appellants are estopped from filing a fresh suit so as to relitigate again.
13. The respondents relied on the case of *Mary Nyongesa Aroka vs. Lazarus Sirengo Mikoyani* (2018)eKLR and *Joshua Alumasi Aboyi vs. Alfred Ivusa Laban & ano.* (2017)eKLR where the court declined to entertain disputes raising similar issues as those determined in Succession Causes previously determined the court clearly pronounced those suits as res judicata.
14. In addition, the respondents submitted that the appellants cause of action in the trial court is in relation to customary trust. The court held that the issue of ancestral land claim by the appellants mother was dealt with and determined by a court of competent jurisdiction in the Succession Cause No. 54 of 1996 consolidated with Succession Cause No. 58 of 1996. With conviction, the respondents submit that by no iota of imagination, is the suit raising a new cause of action. That the doctrine of res judicata applies to matters which might and ought to have been made ground of defence or attack in the former suit.
15. The appellants' claim that the 1st respondent is a new party to the suit is unmerited and unfounded. That a mere addition of a new party to the suit does not except the suit from being res judicata. The central subject of this matter is the suit land which ownership has been contested and determined in the previous suit.
16. In conclusion the respondents submitted that the doctrine of res judicata is meant to bar litigants who do not want to accede to finality of disputes and who would spare no chance to file new cases and add new parties and create cosmetic issues in an attempt for a second bite at the cherry. The court was urged to dismiss the Appeal with costs to the respondent.
17. Having considered the Record of Appeal, the trial court record, the written submissions and all the material placed before me the following issues are for determination:-
 - a. Whether res judicata is founded.
 - b. Who meets the cost of the appeal?



18. The substantive law on Res Judicata is found in section 7 of the *Civil Procedure Act* cap 21 which provides 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”

19. The *Black's law Dictionary* 10th Edition defines “res judicata” 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...”

20. The ownership history of the land is apt to this decision. In the Succession Cause No 54 of 1996 Nduta Kihoti (the Applicants' mother) and her sister Njeri Mwai petitioned for Letters of Grant of Administration in the estate of their brother Migwi Kihoti who died unmarried and childless. Succession Cause No 58 of 1996 was filed by the 2nd Respondent. The Court heard the petitions and determined that under Kikuyu Customary Law Nduta Kihoti and Njeri Mwai could not inherit the estate of their brother. The Court stated as follows;

“Having established that there was no will I will be guided by the Kikuyu Customary Law in respect of the Estate of an unmarried man. In the Restatement of African Law Vol. 2 by Eugene Cotran at page 14, it says that, “The property of an unmarried man whether land, livestock or movables is to be inherited by his father if alive or in his absence, it should be shared equally among his full brothers or in their absence, shared among his half-brothers and so on. It is therefore obvious in Kikuyu Custom Law that sisters can not inherit their brother's property. The Mbere Mwathi and Another (Resps); Civil Appeal No. 123/92. Having reached the above finding, I find that neither the Applicants nor the Objectors are legal heirs to the deceased's estate. They have no claim over the same since there is a surviving brother, he is the right person to take out the Letters of Administration. I will hereby forthwith dismiss the claim by both Applicants and the Objector. The rightful beneficiary under the Kikuyu Customary Law must make the application.”

21. Similarly the court found that the 2nd Respondent could not also benefit and the petition and objection was dismissed. The only beneficiary who could inherit the estate was the brother of Migwi Kihoti namely Wamburi Gatiti alias Waburi Gatiti who eventually registered as owner of the suit land. Upon his death the 2nd Respondent petitioned for succession and the land was registered in his name.

22. The main dispute in the succession cause above related to the succession of the estate of the late Migwi Kihoti.

23. Fast forward the Appellants in Succession Cause No. 1442 of 2011 filed Summons dated the 15/7/2011 seeking to revoke the grant issued to the 2nd Respondent on the grounds that:-

- a. The Grant was obtained fraudulently by concealment from the Court of material facts;
- b. Land parcel Gatamaiyu/Kagwe/601 was ancestral land in which they had ¹/₃ share but which had been mysteriously registered in the name of the deceased;



- c. Their ¹/₃ entitlement to the parcel arose from the fact that they were the grandchildren of one Kihoti Mbuthia in whose name the land was registered in 1958 during land demarcation and adaptation; and
 - d. They were born on this land in the early 1960 as the mother Nduta Kihoti, a daughter of Kihoti Mbuthia, never got married.
24. The Court in dismissing the application held that their application was resjudicata following the dismissal of the application by Nduta Kihoti in 1996. The Court will recall that Nduta's application was dismissed on the basis that according to Kikuyu Cultural norms Nduta and her sister Njeri Mwai could not inherit their brother Migwi Kihoti and it fell on their brother Wamburi Gatiti alias Waburi Gatiti to do so. The claim here was that of inheritance.
25. In both cases cited above the issue for the determination of the Court was administration of the estate and annulment of the grant issued to the 2nd respondent. Nowhere did the Court hear and determine an issue of customary trust.
26. It is true that the parties are the same and the Appellants are suing under the claim of their mothers. The subject property is the same being the suit land. The fundamental difference is the issue being raised in this suit which is that of customary trust. I have keenly perused the decisions of the court and it is clear to the court that the parties were litigating on issues of succession and revocation of grant, an issue very diametrically different from the case before me.
27. I find that the issue of customary trust has neither been heard nor determined by a competent court and therefore hold the suit is not resjudicata.
28. Consequently I uphold the appeal and set aside the Ruling of the trial court delivered on 22/2/2021 in its entirety and order that parties set down the suit for hearing interpartes.
29. Costs shall be borne by the Respondents in favour of the Appellants.
30. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

1st and 2nd Appellants – Absent but served

Muranda HB Mr. Mbigi for 1st and 2nd Respondents

Court Assistants – Phyllis & Lilian

