



**Nkanae & 3 others v Supeyo & another (Both sued as administrators of the Estate of Narau Nkanae (Deceased)) (Environment & Land Case E006 of 2023) [2023] KEELC 18851 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18851 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAROK**  
**ENVIRONMENT & LAND CASE E006 OF 2023**  
**CG MBOGO, J**  
**JULY 18, 2023**  
**IN THE MATTER OF NAROK HIGH COURT SUCCESSION**  
**CAUSE NO. 23 OF 2018**  
**AND**  
**IN THE MATTER OF THE ESTATE OF NARAU NKANAE**  
**(DECEASED)**  
**AND**  
**IN THE MATTER OF LAND PARCELS NOS.**  
**CIS-MARA/ILMOTIOK/413, CIS-MARA/OLOLULUNGA/11241**  
**AND CIS-MARA/OLOLULUNGA/11338 REGISTERED IN THE**  
**NAMES OF NARAU NKANAE(DECEASED)**

**BETWEEN**

**KIRAMATISHO ENOLE NKANAE ..... 1<sup>ST</sup> APPLICANT**  
**KOKWALAL OLE NKANAE ..... 2<sup>ND</sup> APPLICANT**  
**JOHN TOBIKO NKANAE ..... 3<sup>RD</sup> APPLICANT**  
**NAINI MUDASHI NKANAE ..... 4<sup>TH</sup> APPLICANT**

**AND**

**AGNES SOILA SUPEYO ..... 1<sup>ST</sup> RESPONDENT**  
**REGINAH SENKE NDIEMA ..... 2<sup>ND</sup> RESPONDENT**  
**BOTH SUED AS ADMINISTRATORS OF THE ESTATE OF NARAU NKANAE**  
**(DECEASED)**



## RULING

1. Before this court for determination is the notice of motion application dated March 13, 2023 expressed to be brought under orders 40 and 51 of the Civil Procedure Rules, sections 1A,1B,3A and 63 (e) of the Civil Procedure Act and section 68 (1) and 101 of the Land Registration Act, No 3 of 2012 seeking the following orders.
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order that the parcels of land being LR No Narok Cis- Mara/Ilmotiok/413, LR No Narok Cis- Mara/Ololulunga/11241 and LR No Narok Cis-Mara/Ololulunga/11338 be excluded from ongoing proceedings in the Narok High Court Succession cause No 23 of 2018; in the matter of the Estate of Narau Nkanae(deceased) where the said properties have been listed under “schedule of the assets of Narau Nkanae(Deceased)”.
  4. Spent
  5. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of inhibition restricting the registration of any dealings with land parcels nos LR No Narok Cis- Mara/Ilmotiok/413, LR No Narok Cis- Mara/Ololulunga/11241 and LR No Narok Cis-Mara/Ololulunga/11338.
  6. Spent
  7. That the costs of this application be borne by the defendants/respondents.
2. The application is premised on the grounds on its face and more so in the supporting affidavit annexed thereto. The application is supported by the affidavit of the 2<sup>nd</sup> plaintiff/applicant sworn on even date on behalf of the applicants.
3. In the affidavit, the plaintiffs/applicants deposed that they are the biological son, brother and brother-in-law to the 4<sup>th</sup> plaintiff/applicant. Further, that the 1<sup>st</sup> defendant/respondent claims to have been married to Narau Nkanae-deceased who was his biological brother while the 2<sup>nd</sup> defendant/respondent is his step sister and the defendants/respondents secretly instigated the filing of succession cause No 23 of 2018 without involving the rest of the families and had themselves appointed as administrators of the estate of the deceased.
4. The plaintiff/applicant further deposed that they came to learn later that the defendants/respondents deliberately and maliciously included the suit properties as part of the estate of the deceased yet the properties are part of their inheritance from their father which was being held by the deceased on their behalf. Further, that they are suspicious of the actions of the defendants/respondents as they want to disinherit them and for this reason, the defendants/respondents are guilty of material non-disclosure of the fact that the deceased held the property in trust for the rest of the family and not individually.
5. The plaintiffs/applicants further deposed that they have lived peacefully as a family in parcel No Narok Cis-Mara/Ilmotiok/413 where the 3<sup>rd</sup> plaintiff/applicant was the third wife and they subsequently agreed that the said parcel would be held in the names of the deceased on their behalf. Further, that later, together with the deceased desired to move out of the said parcel No Narok Cis-Mara/



- Ilmotiok/413 and which they agreed to sell some portions of land and utilise the proceeds to buy another land. That they did not get a single parcel of land that could accommodate them and they ended up purchasing Cis-Mara/Ololulunga/11241 and Cis-Mara/Ololulunga/11338 and that at the time of transfer, together with the deceased, they agreed that the latter parcels of land be registered in the names of the deceased in trust for all of them.
6. The plaintiff/applicant further deposed that together with the deceased, they agreed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs/applicants occupy parcel No Narok Cis-Mara/Ololulunga/11241 while the deceased and Kinoya Nkanae also deceased and husband to the 4<sup>th</sup> applicant would occupy parcel No Narok Cis-Mara/Ololulunga/11338 which they all occupy to date.
  7. Further, the plaintiffs/applicants deposed that the said properties were demarcated amongst them and the boundaries are clear. In addition, that they have no issue with any parcels owned by the deceased personally and separately included in the schedule of assets in the succession matter before the High Court.
  8. The plaintiffs/applicants further deposed that they have lived on the said parcels of land, tilling and cultivating and they were shocked to learn that the defendant/respondent filed the succession cause without their knowledge. That the nature of this application is to exclude the suit properties from the estate of the deceased as the defendants/respondents could adversely deal with the parcels to their detriment. That the orders sought will not affect the defendants/respondents in any way as it has the effect of maintaining the status quo as failure to grant the same would lead to them being disinherited from their land and that they have nowhere else to go.
  9. In conclusion, the plaintiff/applicant deposed that the High Court in its ruling dated October 11, 2022 stated that it has no jurisdiction to hear issues of trust as it lies with this court.
  10. The 1<sup>st</sup> defendant/respondent filed a replying affidavit sworn on May 18, 2023 in response thereto. The 1<sup>st</sup> defendant/respondent deposed that the application is an abuse of the court process as the plaintiffs'/applicants' claim and issue of inclusion and exclusion of the suit properties were determined by the High Court which dismissed their objection for want of merit *vide* its ruling delivered on October 11, 2022. Further, that this matter has already been decided by a court of equal status and as such, the application is an invitation to this court to sit on an appeal on a decision of a court of equal status. Also, that the ruling of the High Court has never been reviewed, set aside or varied and it remains a decision with legal force and effect.
  11. The 1<sup>st</sup> defendant/respondent further deposed that parcel No Cis-Mara/Ilmotiok/413 is legally owned by the deceased and which the deceased entered into two sale agreements to sell part of the said parcel of land. As such, the deceased could only dispose part of Cis-Mara/Ilmotiok/413 being the registered owner. Also, that the green card of this parcel of land shows the historical ownership and transactions of the land with the deceased as the only registered proprietor. Further, that parcel No Cis-Mara/Ololulunga/11338 is registered in the name of the deceased which he acquired from Inchurra Ranch by virtue of his membership. That parcel No Cis-Mara/Ololulunga/11241 was acquired by the deceased from Engilata Group Ranch where he was a member through transfer of shares from Sankale Ole Selel which transfer was confirmed during the general meeting of Engilata Group Ranch.
  12. The 1<sup>st</sup> defendant/respondent further deposed that section 26 of the [Land Registration Act](#) states that title is *prima facie* evidence of ownership and its import is to protect title holders from being deprived of their title. That the plaintiffs/applicants have not proved that the titles were acquired through fraud and as such cannot claim that the properties are to be held in trust for the entire family. Also, that



- the respondents have not taken any step to evict the plaintiffs/applicants and such claim is based on falsehood.
13. The defendants/respondents also filed grounds of opposition dated May 18, 2023 challenging the application on the following grounds: -
1. The entire application and the supporting affidavit thereto is premised on issues which are now res judicata, having been heard and determined by the High Court sitting in Narok in Narok High Court succession cause No 23 of 2018-In the matter of the Estate of Narau Nkanae.
  2. The issues raised in the application having been adjudicated by a court of competent jurisdiction to which the applicants herein have not appealed against or set aside, this court is precluded from entertaining the application.
  3. The application is fatally defective as it runs afoul the provisions of order 2 rule 6 (1) of the [Civil Procedure Rules](#).
  4. The application is fatally incompetent and an abuse of the court process.
14. The application was canvassed by way of written submissions. The plaintiffs/applicants filed written submissions dated June 29, 2023. The applicants raised five issues for determination as listed below: -
- i. Whether the entire application and supporting affidavit thereto is premised on issues which are now res judicata.
  - ii. Whether the ELC court has jurisdiction to hear this matter.
  - iii. Whether the plaintiffs/ applicants have been and are in occupation of the parcels of land in issue being; LR No Narok Cis-Mara/ Ilmotiok/413, LR No Narok Cis-Mara/ Ololulunga/11241 and LR No Narok Cis-Mara/ Ololulunga/11338 as owners thereof.
  - iv. Whether the plaintiffs/applicants deserve an opportunity to prove that Narau Nkanae (deceased) was holding parcels of land being LR No Narok Cis-Mara/ Ilmotiok/ 413, LR No Narok Cis-Mara/Ololulunga/ 11241 and LR No Narok Cis-Mara/Ololulunga/11338 in trust for his family.
  - v. Whether the ends of justice and fairness are met if the plaintiffs/applicants are granted orders of injunction in terms of prayers No 3,5,7 or 6.
15. On the first issue, the plaintiffs/applicants submitted that under paragraph 38 of the ruling, the High Court automatically transferred jurisdiction of the resolution of the matter to this court. Further, that since the High Court did not delve into the intrinsic issue of ownership of the listed parcels of land, the issue stands unresolved by a court of competent jurisdiction. Also, that the High Court did not consider *viva voce* evidence as is the case when resolving an issue of customary trust despite stating that they were ready to avail witnesses should they be required to. The plaintiffs/applicants relied on the case of [Kibwari Plc v Principal Land Registration Officer, Ministry of Land & Physical Planning & 6 others](#) [2021] eKLR.
16. On the second issue, the plaintiffs/applicants relied on the case of [Re Estate of Samuel Kathieri \(deceased\)](#) [2019] eKLR, and [Dominic Otieno Ogunyo & 2 others v Helida Akoth Walori](#) [2022] eKLR. On the issue as to the determination on the existence of trust, the plaintiffs/applicants relied on the case of [Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & another](#) SCoK No 10 of 2015.
17. On the third issue, the plaintiffs/applicants submitted that the parcels of land were held in their trust by the deceased as the Maasai customary laws and practices encourage this kind of arrangement since



- the first born is the next of kin to their fathers. Also, that since these facts are uncontroverted by the respondents, this court ought to view them with that lense.
18. On the fourth issue, the plaintiffs/applicants submitted that this court ought to grant them an opportunity to be heard on this particular issue of customary trust for the fair disposal of the same. Reliance was placed in the case of *Dominic Otieno Ogunyo & 2 others v Helida Akoth Walori* [2022] eKLR. Further, that the scenario directly reflects the circumstance of the plaintiffs/applicants herein who seek to be heard on this issue despite making it clear that they were willing to present themselves as witnesses.
  19. On the fifth issue, the plaintiffs/applicants submitted that the succession case at the High Court is at the confirmation stage and their fears of being evicted from the parcels of land is closer to being fulfilled and that there is no guarantee that the threats will not be executed. Further that this court should be persuaded by the provisions of article 40 of the *Constitution* on right to live and own property. They relied on the cases of *Margaret Ngoiri Ngotho v Joyce Njeri Njau* [2021] eKLR and *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [2016] eKLR.
  20. The defendants/respondents filed their written submissions dated June 15, 2023 and filed in court on June 21, 2023. The defendants/respondents raised three issues for determination as listed below: -
    - a. Whether the application dated March 13, 2023 is *res judicata*.
    - b. Whether the application offends order 2 rule 6 (1) of the *Civil Procedure Rules*.
    - c. Whether the applicants have surmounted the legal threshold for grant of orders of injunction.
  21. On the first issue, the defendants/respondents submitted that the doctrine of *res judicata* is founded on public policy and has judicially been aimed at achieving two objectives namely that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The defendants/respondents relied on the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and submitted that the instant matter has already been decided by a court of equal status as this court relating to the same parties and the same subject matter and would therefore be an abuse of the court process.
  22. On the second issue, the defendants/respondents submitted that while the applicants have sought temporary injunction in the application, the plaint does not have a similar order either in temporary injunction or permanent injunction thus offending order 2 rule 6 (1) of the *Civil Procedure Rules*. Further, that the application and the plaint seem to be seeking different substantive orders which bring forth different causes of action within the same suit. To buttress on this submission, the defendants/respondents relied on the cases of *John Kubai M'eringa v Fredrick Ntongai M'eringa* [2009] eKLR and *Yang Guang Property Design & Manufacturing Limited v China Wu Yi Company (K) Limited* [2021] eKLR.
  23. The defendants/respondents submitted that the principle to glean from the cited authorities is that, in the case of interlocutory application, it is to be expected that they be attuned to the primary pleadings filed by the parties. Further, that having only sought an order of inhibition in the application which prayer is not substantively sought in the plaint dated March 13, 2023, the application is openly defective.
  24. On the third issue, the defendants/respondents submitted that the application for injunction must fail for the reason that the defendants/respondents have produced certificates of titles which is *prima facie* evidence that the suit properties belong to the deceased. That the plaintiffs/applicants did not prove before the succession court that they have an equal or prior rights to the administrators to apply for the



grant of letters of administration and neither did they prove before the court that the assets contested formed part of the estate of the deceased. The defendants/respondents relied on the cases of *Giella v Cassman Bron* (1973) EA 358, *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR.

25. I have considered the application, replying affidavit, grounds of opposition and the written submissions filed by both parties and the following issues arise for determination: -
- i. Whether the instant application is res judicata.
  - ii. Whether the applicants are entitled to the order sought in the application.
  - iii. Who is to bear costs.
26. On the first issue, it was the plaintiffs'/applicants' submission that the court delivered a ruling on October 11, 2022 dismissing the objection mainly because the information provided by the petitioners was backed by documentary evidence and admitted that these facts weren't disputed by the objectors. The plaintiffs/applicants noted salient positions in the observation which cannot be ignored as contained under paragraph 22 and 25 of the said ruling. More importantly, that paragraph 38 of the ruling automatically transferred jurisdiction of the resolution of this matter from the High Court to this court.
27. 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.”
28. 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.”



29. In *Independent Electoral & Boundaries Commission v 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.”
30. A look at the ruling delivered by F.M. Gikonyo, J on October 11, 2022 shows that the matter before the High Court involved the same parties as they are in the instant application, the issue for determination was directly and substantially an issue for determination before the other court- a court of equal status and which was finally heard and determined by a court of competent jurisdiction.
31. In the matter before the High Court, the subject for determination was an objection filed by the applicants herein. In the said objection proceedings, the court framed three issues for determination which was: -
- a. Jurisdiction to determine the issue of existence of the alleged trust in these proceedings.
  - b. Whether the deceased held CisMara/ Ilmotiok/413, CisMara/ Ilmotiok/11241 and CisMara/ Ilmotiok/11338 in trust for himself and the objectors.
  - c. Ultimately, whether these lands form part of the estate of the deceased.
32. In dismissing the objection, the court in paragraphs 31 to 33 of the ruling analysed the ownership documents with respect to the titles of the said parcels of land and made the observation in paragraph 34 that the plaintiffs/applicants did not provide tangible evidence to prove trust, customary or otherwise. A further reading of the ruling in paragraph 37 indicates that the plaintiffs/applicants had not proved the existence of trust.
33. The High Court, in its conclusion, noted that the parcels of land form part of the estate of the deceased. My analysis of the above is that the High Court, which is a court of equal status dealt with the issues and arrived at the conclusion that the three parcels of land form part of the estate of the deceased.
34. The plaintiffs/applicants have now come to this court seeking that this court excludes the said parcels of land from the ongoing succession proceedings, more notably under similar facts. What is clear is that the plaintiffs/applicants are attempting to relitigate the same issues albeit before a different court. Such actions are not made in good faith and to allow such an application would be an embarrassment to the administration of justice as a whole. I say so, because, this court would undermine the functionality of the operations of a court of equal status which already determined the objection and came to the conclusion that the parcels of land formed the estate of the deceased, that there would be a multiplicity of suits and in any event contradicting orders and generally delay in the realisation of justice.
35. Also, to allow this application would be tantamount to sitting on an appeal of a decision made by a court of equal status which has no foundation in law at all.



36. Having said the above, and on the first issue alone, the application fails as it offends the doctrine of *res judicata*. I do not see any other reason why this court should proceed to determine the other issues.
37. As such, the notice of motion application dated March 13, 2023 is dismissed with costs to the respondents. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 18<sup>TH</sup> DAY OF JULY, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

