



**Kidiya & 2 others v Karigu & another (Suing as Trustees of Pentecostal Assemblies of God (PAG) Kenya) (Environment and Land Appeal E003 of 2022) [2023] KEELC 19061 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19061 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

**E ASATI, J  
JULY 13, 2023**

**BETWEEN**

**JOSEPH OBONDO KIDIYA ..... 1<sup>ST</sup> APPELLANT  
PETER ZING'ANG'A BANDI ..... 2<sup>ND</sup> APPELLANT  
STANLEY ALBERT OMBEVA (BEING SUED AS AN ADMINISTRATOR OF  
THE ESTATE OF GEORGE WILFERD OMBEVA) ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REV STEPHEN NJOROGE KARIGU ..... 1<sup>ST</sup> RESPONDENT  
REV JAMES ONDIEKI OGENDI ..... 2<sup>ND</sup> RESPONDENT  
SUING AS TRUSTEES OF PENTECOSTAL ASSEMBLIES OF GOD (PAG)  
KENYA**

*(Being an Appeal against the Ruling and Order of the Senior Resident Magistrate,  
Hon. R. Ndombi, dated 4th November 2021 in Vihiga ELC No. 13 OF 2020)*

**JUDGMENT**

**Background**

1. The Appellants are the Defendants in Vihiga PMC ELC Case No.13 of 2020 (the suit) which is an ongoing suit. The Respondents have sued the appellants in the suit vide the Plaint dated 29<sup>th</sup> March, 2020 for;
  - a. a declaration that the land parcel No. L.R. South Maragoli Muyonga/1697 belongs to the Plaintiffs.



- b. A declaratory order to compel the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to sign the transfer forms or in the alternative the Executive Officer, Vihiga signs the transfer forms on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in the Plaintiff's favour.
  - c. a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from selling, trespassing or encroaching on L.R.No. South Maragoli/ Buyonga/1697.
  - d. cost of the suit
  - e. any other or further relief the honourable court deems just.
2. The Appellants in response to the Plaint filed a defence and counter claim dated 10<sup>th</sup> March, 2022 denying the Respondents' claim and by way of the counter claim, prayed for:-
- a. a permanent injunction against the plaintiffs their servants, agents and/or assigns from interfering with or in any way dealing with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' groups property described groups property described as L.R. No.south Maragoli/Buyonga/1697.
  - b. an eviction order evicting the Plaintiff, their servant, agent and/or assigns from land parcel No.LR South Maragoli/Buyonga/1697.
  - c. The OCS Vihiga police be and are hereby authorized to oversee the eviction or the Plaintiffs, their servants, agents and/or assigns from land parcel L.R. No. South Maragoli/Buyonga/1697 by an execution order by providing security and ensure that peace and order prevail on the property.
3. Before the suit could be heard, the appellants raised a preliminary objection dated 2<sup>nd</sup> August, 2021 on the following grounds:
- a. The application and the main matter herein is res judicata and offends Section 7 of the [Civil Procedure Act](#).
  - b. That the Plaintiffs are estopped from instituting and/or filing the present suit, a similar suit having been heard and determined in Succession Cause No.227 of 2014 in High Court Kitale.
  - c. That the High Court order of 23<sup>rd</sup> September, 2019 is still in place, the Plaintiff did not exhaust all available remedies and appeal process as laid down in law, then this honourable court does not have the requisite jurisdiction to hear and determine this matter.
  - d. That the suit is an abuse of the court process.
4. It was the appellants contention in the preliminary objection that the application and the main suit were similar to the facts and issues in Succession Cause No.227 of 2014 High Court Kitale. That the parties in the cause are also similar to the ones in the suit herein and were litigating under the same title as in the present suit. That parties canvassed the issues of ownership of the cause and a ruling culminating in the order dated 23<sup>rd</sup> September, 2019 made. That the Plaintiff refused to exhaust all available remedies and appeal process as laid down in law but are now re-litigating. That the suit herein is a waste of court's time and an abuse of the due process of law. That the court did not have the requisite jurisdiction to hear and determine the matter as it could not overturn or review decision of the High Court.
5. The preliminary objection was argued by way of written submissions. The trial court vide its ruling dated 4<sup>th</sup> November, 2021(the ruling) found that the preliminary objection dated 2<sup>nd</sup> August, 2021 was not merited, dismissed the same and ordered that costs be in the cause.



6. Aggrieved with the ruling, the Defendants proffered the appeal herein vide the Memorandum of Appeal dated 29<sup>th</sup> November, 2021 seeking that: -
- i. the appeal be allowed
  - ii. that the court do hold that the Appellants established that the case is fully covered by principles of res judicata and that the trial court has no jurisdiction to re-open the case.
  - iii. costs of the appeal and the lower court.
7. The appeal was by consent canvassed by way of written submissions. Written submissions dated 22<sup>nd</sup> May, 2023 were filed on behalf of the 3<sup>rd</sup> Appellant by the firm of T.A. Aswani Advocates. Counsel submitted that the suit land was registered in the name of the Appellants as trustees of Adonai Self Help Group through the process of succession to the Estate of one George Wilfred Ombeva the original registered owner in succession cause number Kitale High Court Succession Cause No.227 of 2014 through an order dated 23<sup>rd</sup> September, 2019.
- That that being the case, the Respondents, if they felt aggrieved with that decision of the Probate and Administration court, had 2 alternatives namely; either to go back to the Probate and Administration court for review of the order dated 23<sup>rd</sup> September, 2019 or to appeal to the Court of Appeal.
- That instead, the Respondents filed the suit at the Senior Principal Magistrate's court at Vihiga which court had no power to review the decision of the High Court at Kitale in the Succession cause or to exercise any appellate jurisdiction over the decision.
- That all the elements of res judicata were established hence the court ought to have ruled that the suit involved a matter that had been heard by a competent court, that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and the Respondents were concerned with the same issues and that they are the same litigants who were in the Probate and Administration matter.
8. Counsel submitted that the law on res judicata is found in Section 7 of the [Civil Procedure Act](#) and is a bar to multiplicity of suits and guarantees finality in litigation. Replying on the Civil Appeal No.105 of 2017, the Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others Counsel submitted that the elements of res judicata are that;
- a. the suit or issue was directly and substantially an issue in the former suit;
  - b. the former suit was between the same parties or parties under who they or any of them claims;
  - c. those parties were litigating under the same title;
  - d. that the issues were heard and finally decided in the former suit.
  - e. The court which formerly heard and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.
9. Counsel submitted further that the issue in the suit is ownership of land parcel No.LR. South Maragoli/Buyonga/1697 which was directly and substantially the issue in Kitale High Court Succession Case No.227 of 2014. That the matter/issue was between the same parties namely the Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein. That the Kitale High Court which had the jurisdiction heard the matter and decided on the same.
- That this being the case, the decision of the lower court that ownership of the suit land was not determined in the Probate and Administration court was erroneous.



That the 3<sup>rd</sup> Appellant had no dispute with the 1<sup>st</sup> and 2<sup>nd</sup> Appellant or the Respondents in the Probate and Administration cause. That the role of the 3<sup>rd</sup> Appellant as administrator of the estate of the deceased was to transmit the suit land to the appropriate beneficiaries as determined by the Probate and Administration court.

That the matters raised in the suit are matters that would be handled in the Probate and Administration court under Section 74 and 76 of the *Law of Succession Act*.

Counsel relied on the case of Re-Estate of Julius Ndubi Javan (Deceased) [2018] eKLR where it was held, inter alia, that where issues of ownership of the property in the Estate are raised in the Succession cause, they must be resolved before the property is distributed and that under Rule 41(3), claims which are valid should be determined before distribution. Counsel prayed that the appeal be allowed.

10. Written submissions dated 5<sup>th</sup> June 2023 were filed on behalf of the Respondents by the firm of Ben Aduol Nyanga & Co. Advocates. Counsel framed 3 issues for determination in the appeal. Firstly, whether or not the learned trial Magistrate erred in law and in fact in holding that the issue of ownership of the suit land was not an issue in the summons for revocation of grant. On this issue, Counsel submitted that the purpose of rectification of grant as provided for in Section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules cannot extend to the question of ownership of the disputed parcel of land. Relying on the case of Estate of Henry Muthimbu Kariga (deceased) Succession Cause No.93 of 2015 and Estate of Georffrey Kinuthia Nyamuringa (deceased) [2013]eKLR, Counsel submitted that the scope of rectification of grant of representation is limited to errors in names and description and hence the question of ownership of the suit land could not have been a question of determination during the Summons for Rectification of grant.
11. The second issue for determination, according to the Respondent is whether or not the Respondents were estopped from bringing the issue of ownership of the suit land due to fraud, in the Senior Resident Magistrate's court as a new issue. Counsel, relying on the decision in Mills v Cooper [1967] 2 QB 459 and DPP v Humphrey [1976] 2 All ER 497 submitted that to establish an issue of estoppel there must have been a final judgement/order between the same parties or their privies, litigating in the same capacity in the same issue and that the estoppel must be pleaded.

That the issue of ownership of land was not directly or substantially an issue during the proceedings of Succession Cause No.227 of 2014 at the Kitale High Court. That no judgement and/or orders touching on the issue of ownership of the suit land were issued by the said court. Counsel submitted that therefore the matter was properly before the learned trial magistrate for hearing and determination.

12. The third issue identified by the Respondents is whether or not the question of rights of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and those of the Respondents in the suit land did not amount to dispute under the *Law of Succession Act* Cap 160 Laws of Kenya Section 47.

Relying on the cases of Owners of the Motor Vesel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR and Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Appeal Application No.2 of 2011, Counsel submitted that the issue raised herein goes to the question of jurisdiction. That where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. Relying further on the case of IEBC (Applicant), Constitutional Application No.2 of 2011, Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, Counsel submitted that the nature of the matter placed before the trial court was not one of probate but within the scope and dictate of the *Environment and Land Court Act* 2011. Hence it would be contrary to reason for the trial court to apply the provisions of the *Law of Succession Act*



to a land dispute. Counsel urged the court to find that the appeal is unmerited and do dismissed it with costs.

### **Issues for Determination**

13. The Memorandum of Appeal dated 29<sup>th</sup> November, 2021 raised five (5) grounds of appeal namely that the learned Senior Resident Magistrate erred in law and in fact:-
- a. in holding that the issue of ownership of the parcel of land in question L.R. No.south Maragoli/Buyonga/1697 was not an issue in the Summons for Rectification of Grant.
  - b. in not realizing that the purpose of rectification in a Grant as to the names of description of any person or thing and therefore the 3<sup>rd</sup> Appellant together with his Co-administrator were right to seek the correct owners of the parcel of land L.R. No.south Maragoli/Buyonga/1697 in accordance with the evidence presented to them by both the 1<sup>st</sup> and 2<sup>nd</sup> Appellant
  - c. in failing to consider that a family court has full jurisdiction to deal with the issue of fraud or concealment of material facts and therefore if the Respondents had such evidence of fraud then only the family court at Kitale was the best place to contest the matter.
  - d. in not holding that the failure of the Respondent from referring the issue to ownership of the said parcel of land due fraud to the same family court, stopped them from bringing the issues in that court as a new court, which it was not.
  - e. When she noted that the question of the rights of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and those of the Respondents in the said parcel of land did not amount to a dispute under the [Law of Succession Act](#) Cap 160 Laws of Kenya Section 47 thereof and therefore she had a right to determine the issue.

These grounds of appeal are the issues for determination herein.

### **Analysis and determination**

14. This is an interlocutory appeal challenging the ruling of the trial court on a preliminary objection.
- There is no doubt that registration of the suit land in the name of the organization associated with the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was as a result of the court order in the Succession Cause. The court order was dated 23<sup>rd</sup> September, 2019.
- It has been demonstrated that church organization which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents represent (the Vihiga P.A.G. Church also known as Satellite P.A.G. Church) was involved in the Succession Cause. At one time their name was indicated in the certificate of Confirmation of grant as the beneficiaries of the suit land.
- In an application for Rectification of Grant dated 2<sup>nd</sup> September, 2018 attached to the 1<sup>st</sup> Appellant's Affidavit in Support of the Notice of Preliminary Objection, the 3<sup>rd</sup> Appellant had stated that the suit land had been sold to Vihiga Pentecostal Church which had the original title to the same but to whom the land was yet to be transferred.
- The 3<sup>rd</sup> Appellant had stated further in the said application for Rectification of Grant that as the same (suit land) is still in his deceased father's name and has not been transferred to the said church, it is in the interest of all concerned that the said asset be included as an asset of the state to enable the Administrators to legally transfer it to the Church upon formation of the Grant.



The record shows that there was another application for rectification of grant which resulted in the order dated 23<sup>rd</sup> September, 2019 which rectified the grant by deleting the Respondent's name and replacing it with that of the organization belonging to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.

I agree with the Appellants that the lower court will not have the jurisdiction to issue orders whose effect will be to set aside, review or vary the orders of the High Court. I find merit in the appeal and allow it. I find that the suit is improperly before the trial court. The Respondents have recourse to the Probate and Administration court to seek review or proceed on appeal.

The upshot is that this court finds that the appeal has merit and allows it and makes the following orders.

- i. The ruling dated 4<sup>th</sup> November 2021 in Vihiga PMC ELC No. 13 OF 2020 hereby set aside and substituted with an order upholding the preliminary objection.
- ii. The suit is struck out for lack of jurisdiction with no orders as to costs.
- iii. Each party to bear own cost of the appeal

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 13TH DAY OF JULY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

.....

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Neville- Court Assistant.

Aswani for the Appellants.

Willie for the Respondents.

