



Waithaka & 2 others v Waithaka; Kariithi (Interested Party) (Environment & Land Case E173 of 2023) [2023] KEELC 21381 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E173 OF 2023**

**JA MOGENI, J
OCTOBER 31, 2023**

BETWEEN

CHARITY MURINGO WAITHAKA 1ST PLAINTIFF

ABEL KANG'ETHE WAITHAKA 2ND PLAINTIFF

IRENE GATHONI WAITHAKA 3RD PLAINTIFF

AND

CATHERINE WAMUYU WAITHAKA DEFENDANT

AND

JAMES MURIUKI KARIITHI INTERESTED PARTY

RULING

1. By a notice of motion dated 10/05/2023 filed by plaintiffs which application did not cite any orders under which the notice of motion was filed they sought the following orders:
 - a. Spent
 - b. This honorable court be pleased to issue an order of preservation of title for LR 2327/53 (Original No. 2327/8/45) Nairobi pending the hearing and determination of the main suit.
 - c. This honorable court be pleased to issue an interim injunction barring the defendant from disposing of the suit property pending the hearing and determination of the suit.
 - d. The Honorable court be pleased to make any other orders that it deems fit in the best interests of justice.



2. The plaintiffs have listed three grounds upon which the said application is premised upon which are on the face of the application and I see no need of repeating them here.
3. The application is supported by supporting affidavits sworn by Charity Muringo Waithaka, the 1st plaintiff, Abel Kang'ethe Waithaka the 2nd plaintiff and Irene Gathoni Waithaka the third plaintiff all dated on 10/05/2023.
4. Before the application could be argued, the defendant and the interested party filed a preliminary objection and grounds of opposition to the application dated 3/07/2023 respectively.
5. The preliminary objection is on the jurisdiction of this court.
6. When the parties appeared in court on 5/07/2023 the 2nd plaintiff made an oral application to withdraw from the suit. Since there was no objection from any party opposing the application the court granted the oral application made and marked the 3rd plaintiff's suit as withdrawn.
7. The parties on the same date they appeared in court agreed to canvas both the preliminary objection and the notice of motion application by way of written submissions.
8. Whenever there is a preliminary objection raised it is always prudent that the court considers the preliminary objection first in the event the preliminary objection is unsuccessful and fails to resolve the issues at hand, then the Court will then deal with the application.

Brief facts of the case

9. The applicants allege that they are the beneficial owners of LR 2327/53 (Original No. 2327/8/45) by virtue of the fact that the said property is family property and therefore family heritage.
10. They contend that the defendant and the interested party are administrators in the Estate of the Late Charity Muthoni Benson who is their grandmother which was as a result of confirmation of a grant. Further that despite this confirmation, proper transfer and distribution of the estate has not been undertaken.
11. They further contend that the defendant since the confirmation of the grant has been enjoying exclusive benefits from the parcel of land which is the subject of the suit property to the detriment of the interested party who is a co-administrator.
12. It is their averment that the intention of the grant was to establish the suit property as land held in trust for the entire family but the defendant has treated the suit property as her own to the exclusion of the applicants.
13. The plaintiffs aver that the defendant has entered into a sale agreement over the suit property with one Joseph Kenyatta Oballah and one Elseba Aluoch Onyango for a sum of Ksh. 30,000,000. Further that the interested party was misled by the defendant to agree to the transaction for sale of the suit property on the basis of non-existent debt in land rates to the Nairobi City County. They aver that they have attached a copy of the sale agreement and a copy of statement which attests to the fact that there were not land rates owing which documents were however not attached.
14. The defendant filed a preliminary objection contending that this court has no jurisdiction and that this suit falls short of the doctrine of *res judicata*. Further which was as a result of a succession cause number 759 of 1987.
15. The defendant further contends that the subject matter of this suit which is LR 2327/53 no longer exists as a result of a ruling by Justice Lenaola (as he then was) in Civil Suit No. 1798 of 1999.



16. In sum, the defendant avers that the plaintiffs do not qualify for the equitable relief of injunction and that the entire suit is a non-starter.
17. On his part, the interested party filed grounds of opposition to the notice of motion application in which he contends that since he is the proprietor of the suit property he ought to have been enjoined in the suit as a defendant. That the plaintiffs had opportunity to seek rectification of the grant but having not opposed it the confirmation of the grant means that the succession cause was closed and they are not beneficiaries.
18. He contends that following the issuance of the grant on 22/09/1995, the suit property was divided into two equal shares between the interested party and the defendant. Further that this being a probate matter this court lacks jurisdiction over the said matter.
19. He further contends that the plaintiffs swore affidavit on behalf of the interested party but he never instructed them to do so further that he had given the power of attorney to the defendant to act on his behalf on all matters touching on the suit property. Further that it was his choice for the defendant to act on his behalf since she is his sister.
20. It is his contention that the plaintiffs who are his nephew and nieces have no claim on the suit property coming 36 years later and that the claim is not supported by sufficient evidence.

Determination

21. I have considered the preliminary objection and the application together with the submissions filed by and the defendant. For good order I will dispose of the preliminary objection first.
22. It is urged on behalf of the defendant that this matter is *res judicata* as the plaintiffs lack *locus standi* and that they are strangers to the subject property which was a result of succession Cause No. 759 of 1987. Further this is a claim of probate to which the plaintiffs were not beneficiaries as per section 29 of the [Law of Succession](#) hence the present application is an attempt at litigating afresh a matter that was determined in Civil Suit No 1798 of 1999 thus making the suit fatally defective.
23. This brings us to what the doctrine of *res judicata* is all about.

a cause of action may not be relitigated once it has been judged on the merits; finality.} *res judicata* is all about.
24. Section 7 of the [Civil Procedure Act](#), 2010 provides as hereunder:

“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. It is now old hat that the said doctrine applies to both suits and applications as was held in *Abok James Odera v John Patrick Machira* Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of *res judicata* there must be:
 - (i). a previous suit in which the matter was in issue;
 - (ii). the parties were the same or litigating under the same title;
 - (iii). a competent court heard the matter in issue;



- (iv). the issue had been raised once again in a fresh suit.
26. In *Nancy Mwangi T/A Worthblin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR the Court quoted the case of *E.T v Attorney General & another* [2012] eKLR wherein the court noted thus:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited & others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

27. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.
28. In this case, the defendants claim that the plaintiffs were not beneficiaries to the civil suit No. 1798 of 1999 which determined the succession matter. I wish to further point out that for a party to rely on the defence of *res judicata*, it should be first raised in the defence which is not the case herein. The defendant chose to file a preliminary objection.
29. From the information presented by the defendant claiming that this matter is *res judicata*, they did not attach any copies of the succession cause but he has clearly stated that the plaintiffs herein were not parties to the succession cause. From my observation I therefore come to the conclusion that the civil suit No. 1798 of 1999 was in respect to matters succession and the issue of constructive trust was never determined.
30. In the case of *Elijah Gachoki and another v Stanley Mugo Kariuki & another* citation Kerugoya H. C. Succession Cause No. 90/2013 the Court held that:

“It is also important to note that the *Law of Succession Act* cap 160 Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard. I agree with the 2nd respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under article 162(2) of the *Constitution*”.

31. In the case of *Elijah Gachoki and another v Stanley Mugo Kariuki & another* citation Kerugoya H. C. Succession Cause No. 90/2013 the Court held that:

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32. Article 27(1) and (2) of the *Constitution* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The *Constitution* goes further to state that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The right to be heard as enshrined in Art 50 of the said constitution is one such rights.
33. Guided by *Constitution*, this Court is prepared to give the Plaintiffs the benefit of the law. That is to say that their dispute premised on trust which I can see from the pleadings before me, needs to be litigated and determined by a competent Court to finality.
34. The test in determining a Preliminary Objection was set out in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696 where the Court held that:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.
35. From the case law cited above, it means that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
36. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank & another* [2014] eKLR the Court stated;

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of resjudicata duplicity of suits having been spent will require probing of evidence as it is already evidenced from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on Preliminary Objection. Court of laws have always had a well-founded quarrel with parties who resort to raising Preliminary Objections improperly.”
37. Guided by the above cases, it is clear that the Preliminary Objection herein is not a pure point of law because the circumstances of this case is blurred by factual details that require the Court to examine evidence. The Preliminary Objection is therefore unmerited.
38. I now turn my attention to the application herein where the Plaintiffs have sought for an order of preservation of title until the suit has been heard and determined. At the same time the plaintiffs have sought for an interim injunction barring the defendant from disposing of the suit property.
39. From the outset it is proper for me to state that there is a difference between preservatory orders and orders of injunction or even inhibition orders. These should not be confused. Now, preservatory orders relate to or are ordinarily directed to properties of a historical nature a natural habit that need to be maintained in the state they are until the end of the case or at the inter partes stage.



40. Brian A. Garner, in *Black's Law Dictionary*, 11 Edition Thompson Reuters, St. Paul MN, 2019 p. 1434 defines a preservatory order as follows:
- “An order prohibiting a property owner from taking action that would alter a historic building or natural habits before the Court makes a final order.”
41. An injunction sought.
42. The case of *Kaboho v Secretary General*, EACJ Application No. 5 of 2012, and *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others* [2016] eKLR emphasized on the exercise of discretion as follows:
- “... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously.”
43. The prayers sought herein are injunctive in nature. In the case of *Rose Njeri Ndegwa v Samuel Sobi J. Misingu* [2019] eKLR, Judge M.C. Oundo was of the view that, “preservatory orders are in essence similar to injunctive orders where an Applicant has to make out a prima case and show that s(he) will suffer irreparable loss if the order sought is not granted.” .
44. The case of *Giella v Cassman Brown and another* [1973] EA 358 provides the three principles for granting an injunction and I will not repeat these here. I will however refer to the principles as I consider the facts before me. From the information presented before me the defendant claims to be the registered owner of the suit property although there was no evidence presented in court to attest to this claim. A copy of the land registration was not presented.
45. On their part, the plaintiffs pleaded that they were entitled to the land by virtue of it being family land and invoking the issue of a constructive trust.
46. The plaintiffs complained of the defendant has entered into an agreement to sell the suit property without consent of the interested party nor the plaintiffs. The defendant on her part has acknowledged that she would want to dispose of the suit property because it belongs to her and the interested party by virtue of the fact that it belonged to her mother and that she did not need any consent from the plaintiff's applicants as the land belonged to her and the interested party as jointly despite not presenting any document as testimony to this claim.
47. I note that if it turns out that the suit property was family land as stated by the plaintiffs, then I am convinced that the actions and any further actions of the defendant and other persons who may or have already acquired part of the suit property contrary to the consent and participation of the entire family would be and are capable of causing damage that may not be compensated by damages. Such actions as those complained of by the plaintiffs and which have been admitted, of selling or continuing to sell, transfer and or dealing with the parcels of land to their detriment are a likely precursor of occasion of irreparable damage.
48. I do therefore note that, since the plaintiffs pleaded trust this a major issue to be determined in trial to establish whether the defendant holds or held the titles in trust for the plaintiffs which may or may not be proved in trial. It is indeed only prudent for the orders of injunction and inhibition to issue at this stage for purposes of preserving the suit properties. I find that the plaintiffs have established a *prima facie* case against the defendant.
49. As to whether the plaintiffs cannot be adequately compensated by an award of damages, I have found as much. In any event, I am not in doubt that the balance of convenience tilts in favour of the plaintiffs



50. Given the foregoing the court determines the preliminary objection and the application as follows:
- a. The preliminary objection is unmerited and is hereby dismissed with costs to the plaintiffs.
 - b. The order of preservation of title for LR 2327/53 (Original No. 2327/8/45) be and is hereby issued pending the hearing and determination of the main suit
 - c. That there be and is hereby issued an interim injunction barring the defendant from disposing of the suit property pending the hearing and determination of the suit.
 - d. To ensure the suit property is preserved as is I order that the status quo prevailing as the time of filing this suit be maintained.
 - e. Parties to comply with order 11 within 30 days mention shall therefore be on 30/11/2023.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Muigarire holding brief for Mr. Abenga for the Plaintiffs

Ms. Kemunto holding brief for Ms. Ajwang for Defendant/Respondent and Interested Party.

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

