



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**MISC. APPLICATION NO. 81 OF 1996**

AMOS WAMUNYU.....RESPONDENT

VERSUS

TABITHA WANJIRU OMOLO.....1ST RESPONDENT

JOHANA MAINA SIMON BEING THE GURDIAN

AD LITEM OF BERNARD KANGANGI.....2ND RESPONDENT

AND

JOHN MAINA KANGANI

NEHEMIAH NDUMO GITAHU.....INTERESTED PARTY/APPLICANTS

**RULING**

The applicants have filed in this court an application dated 4th October 2014, seeking to be enjoined in the matter to defend their respective interests, by being allowed to respond to issues in the suit. The genesis of the matter is land Ref No. 8470/18 located within Nyeri municipality which was transmitted to 4 people among them the husband of the 1st respondent. It was then to be subdivided into 4 portions each getting an equal share. The family of the Omollo Ongwani Surkwale, who had 2 wives;- Tabitha Wanjiru and Wanjugu Symon, who was initially represented by Bernard Kangangi his son, and later by her daughter Johanna Maina Symon. Each family got its share of 6.62 acres.

Amos Wamuyu filed SPMCC No. 407 OF 1995 Nyeri , claiming 1 .5 acres from Tabitha's share. The matter was referred to the District Land Tribunal and was decided in his favour. The court adopted the finding of the tribunal in the High Court Misc. File No 81 of 1996, on the 29th October 1997, and thereafter all proceedings were dealt with by the High Court. From the portion of Wanjugu Symon, Amos Wamunyuu claimed 1 acre sold to him by Wanjugu Simon, however, the families failed to give him hence he filed an application locking up the whole suit land from subdivision. However the owners of the other portions complained that the Amos Wamunyuu's application should not lock the whole land as each wanted to deal with their portions, thus they were enjoined in the application on the 11th Dec 2001. The applications of other adjacent land owners were heard and the court released their portions.

In the application dated 8th October 2001, the applicants, Nehemiah Ndumo Gitahi and his wife Wangari Ndumo were seeking to be enjoined as parties in the matter. They claimed the portion they purchased from Tabitha Wanjiru, In the year 1995. Since the matter between these parties and Amos Wamunyuu had started at the land tribunal, the court having adopted the tribunals finding the matter between them and Amos Wamunyuu was held to be res judicata in the courts ruling dated 11th Dec 2001.

In the application before the court filed on the 4th October, 2011, the son of the late Bernard Kangangi and Nehemiah Ndumo Gitahi are seeking to be enjoined into the suit as interested parties. John Maina's main contention is that his father is now dead, and they want to be enjoined in Amos' application dated 11th may 2011 seeking to review the orders that confirmed his entitlement to 2 ½ acres from the defendants, on 29/10/97 and 10/4/2001 and where he seeks the review of the description of the suit land as after mutation it has changed names to a new Lr No. NYERI UNICIPALITY/BLOCK 12/18.

All the parties have responded to the application, and Tabitha takes fault with Amos transferring the SPMCC no 407 of 1995 to the High Court upon realizing that the lower court did not have jurisdiction, and stated that the move made the suit void abinitio and there is no sound decision of the court in respect of the matters herein. She adds that she is not aware of the orders made on the 10/7/96, 3/7/96 or those of the 10/4/96 and believes that she is responding to the application of 11th may 2011.

Amos responded to the application and states that the judgment in his favour against Tabitha was by consent on the 29/10/97, which she has never appealed, or filed a Judicial Review application challenging the orders of the court. He states that Tabitha is trying to reopen the cases already concluded. In opposition to the application dated 4/10/2011 Amos states that the matter is already res judicata and that whatever the guardian of Bernard did was legal and binding. On the issue of Nehemiah he reminds him that the court has already found that he cannot be enjoined into the matter as it was res judicata. He adds that enjoining of the intended parties is meant to re-open the case. In his reply, Johana who was a guardian of Bernard concurs with Amos, stating that the matters should not be revisited and that the application is overtaken by events.

Parties in their written submissions reiterate the same points of law in respect of the application of 4/10/2011.

I have considered the pleadings, arguments and counter arguments of the parties here in as well as their submissions.

On the application by Nehemiah Ndumo Gitahi the court dealt with a similar application in this file on the 11th Dec 2001, finding that he could not be enjoined as a party in this matter, since they were parties in the case before the tribunal whose finding they never appealed against. The court had already dealt with the issue and it would have been better for this particular applicant to file an appeal against the earlier ruling than to bring it again before the court. Having been found to have been a party in the Case before the Land Disputes Tribunal, his case was held as res judicata. Res judicata is defined in sec 7 of the Civil Procedure Act as

***“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 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”.***

This applicant has been in the court previously with the same application which was dismissed as being res judicata hence is barred from filing a similar application.

As regards John Maina Kangangi, i have read para 4 of his affidavit. He states to be in the process of filing for grant of letters to his late father's estate. His father was presumed dead and death certificate issued via orders of this court on the 1/11/2010 in misc application no 121 of 2010. He thus lacks capacity to approach this court, having not regularized his representation by obtaining the grant of letters. In the case of, **Mary Wanjiru Njuguna V Hezekiah Mathara [2010] eKLR**, It was agreed the case could not proceed because the appellant died in the process of the appeal and grant had to be obtained before proceeding, but the suit abetted before substituting the deceased despite grant being obtained in time.

In Bernard's case, his father was all through represented by his sister Johana who stated she was his

guardian. A guardian is defined in the blacks law 9th edition as;- ***one who has a duty to care for another's person or property especially because of the other's infancy, incapacity, or disability.*** His claim having been handled by his deceased fathers legal guardian, he was ably represented and there is nothing to be litigated upon, as he is in the limb of persons claiming under the title of the deceased. Even if John Maina had the letters of representation, he could not have been enjoined solely for the purposes of questioning what was done by the deceased's guardian. His main purpose being to replace a party in a concluded matter, which court has found is res judicata, because he is coming in the capacity of the deceased.

In light of the foregoing I find the application by both the applicants being without merit is hereby dismissed with costs.

***Dated, signed and delivered at Nyeri this 11th day of December, 2014.***

**A. OMBWAYO**

**JUDGE**