



**Karanja v Wamai; Registrar of Land, Nyeri County & 3 others
(Interested Party) (Environment and Land Miscellaneous Application
E004 of 2002) [2022] KEELC 38 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 38 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2002**

JO OLOLA, J

MAY 26, 2022

**IN THE MATTER OF ARTICLE 2, 31(B), 40(3) (B)
AND 48 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 100(3) OF THE LAND ACT (NO. 6 OF 2012)

AND

**IN THE MATTER OF SECTIONS 56, 57, 58, 64, 66(5) AND 69
OF THE CIVIL PROCEDURE ACT (CAP. 21) LAWS OF KENYA**

AND

**IN THE MATTER OF ORDER XXI RULES 6, 7, 8 AND
10 OF THE CIVIL PROCEDURE RULES (REV. 1998)**

AND

**IN THE MATTER OF RULES 6, 11(1)(B), 15, 16 AND
18(3 & 4) OF THE AUCTIONEERS RULES, 1997 AND**

AND

IN THE MATTER OF THE TRESPASS UPON AGUTHI/MUNG'ARIA/562

BETWEEN

EDWARD MAINA KARANJA APPLICANT

AND

SIMON NDERITU WAMAI AKA WAMAE RESPONDENT

AND

REGISTRAR OF LAND, NYERI COUNTY INTERESTED PARTY



ARCHIVIST, NYERI LAW COURTS INTERESTED PARTY
NATIONAL BANK OF KENYA (HARAMBEE AVENUE) .. INTERESTED PARTY
HIPPO GENERAL MERCHANTS (AUCTIONEERS) INTERESTED PARTY

RULING

1. By the Notice of Motion dated January 27, 2022, Edward Maina Karanja (the Applicant) prays for orders;
 1. That this Honourable Court be pleased to make an order directing the Registrar of Lands, Nyeri County, to produce for perusal before this Court all documents regarding the registration of Simon Nderitu Wamae as owner of all that land known as Aguthi/Mung'aria/562.
 2. That this Honourable Court be pleased to make an order directing the Archivist, Nyeri Law Courts, to produce before this Court for perusal the entire Court file in Civil Case No. 31 of 1987 at the Chief Magistrates Court at Nyeri.
 3. That this Honourable Court be pleased to make an order directing the Archivist Nyeri Courts, to produce before this Court for perusal the entire Court file in HCCC No. 112 of 1984 at the High Court of Kenya at Nyeri.
 4. That this Honourable Court be pleased to make an order directing the Registrar of Lands, Nyeri County, to register a caution on all that land known as Aguthi/Mung'aria/562;
 5. That this Honourable Court be pleased to make a declaration that the registration of Simon Nderitu Wamae as owner of all that land known as Aguthi/Mung'aria/562 is null and void ab initio and is hereby revoked;
 6. That this Honourable Court be pleased to make a declaration that Edward Maina Karanja is the lawful owner of all that land known as Aguthi/Mung'aria/562;
 7. That this Honourable Court be please to make an order that the Court file in Civil Case No. 31 of 1987 be returned to the Chief Magistrate Court at Nyeri to be marked as closed;
 8. That this Honourable Court be pleased to make an order that the Court file HCCC 112 of 1984 be returned to the High Court at Nyeri to be marked as closed;
 9. That this Honourable Court be pleased to make any other orders deemed expedient in the circumstances; and
 10. That costs of this application be provided for.
2. The application which is supported by an affidavit sworn by the Applicant is based on the grounds inter alia, that:
 - (a) The Applicant's son, Peterson Mwaniki Maina was found dead in his house on 3rd January, 2022 and the family intends to bury him at their ancestral home on the parcel of land known as Aguthi/Mung'aria/562;
 - (b) The body of the deceased is preserved at Kenyatta University Funeral Home;
 - (c) The indefeasibility of the Applicant's title to the said parcel of land subsists to-date;



- (d) The Applicant is in possession of the original title to the land and the same has never been revoked nor is there an order for its surrender;
 - (e) That Simon Nderitu Wamae unlawfully irregularly and procedurally procured title to the suit land by fraud and misrepresentation;
 - (f) The Respondents will suffer no prejudice if Prayers 1, 2, 3 and 4 are granted;
 - (g) That the wheels of justice tilt in favour of granting the prayers sought.
3. Samuel Nderitu Wamae (the Respondent) is opposed to the application. In his Replying Affidavit sworn and filed herein on 7th February 2022, the Respondent avers that the application before the Court is incompetent and a gross abuse of the Court process as the Applicant is aware that there has been litigation over the same matter in both the High Court and the lower Court which matter went into arbitration and a final decision was made.
 4. The Respondent further avers that the Applicant participated in the arbitration and that after an award was made in favour of the Respondent, the Applicant filed an application to have the same set aside.
 5. The Respondent further avers that the Applicant failed to pay the sum decreed by Court and it was then that the suit property was sold in execution by way of public auction upon which the Respondent was declared the highest bidder. The Respondent purchased the property and was registered as the proprietor of the suit property on 13th February, 2009.
 6. The Respondent avers that the Applicant has been very difficult and obstinate from the time the Respondent sued him in 1984 to-date. The Applicant is aware of how the Respondent came to be registered as the owner of the suit property and the Applicant no longer has any proprietary rights over the same.
 7. The Respondent avers that the issue concerning the ownership of the said L.R. No. Aguthi/Mung'aria/562 has long been determined and the suit herein is res judicata.
 8. In response to the said Application, the National Bank of Kenya (the 3rd Interested Party) filed its own Notice of Motion dated 4th March, 2022 wherein it urged the Court to strike out the suit as against itself on the grounds that the suit property was discharged after settlement of the loan in 1984 and as such the Bank does not have any interest or achievable claim thereon.
 9. The Applicant was able to secure documents he had required from the 1st and 2nd Interested Parties at the Preliminary stage and the said Parties as well as the 4th Interested Party did not take part in the subsequent proceedings.
 10. I have carefully perused and considered the Motion dated 27th January, 2022 and the responses thereto by the Respondent as well as the 3rd Interested Party. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates acting for the Parties.
 11. The orders sought by the Applicant against the 1st and 2nd Interested Parties to produce certain documents as captured in Prayers 1, 2 and 3 of his application were dealt with at the Preliminary stage. The main issue for determination in this matter is to be found at Prayers 5 and 6 of the application wherein the Applicant urges the Court to make a declaration that the registration of the Respondent as the proprietor of the suit property is null and void and that the Applicant is the rightful owner of the said property.



12. In support of that contention, the Applicant told the Court that he remains in possession of the original title to the suit property and that the same has never been revoked or an order made for its surrender. It is the Applicants case that the Respondent unlawfully, irregularly and unprocedurally procured title to the suit land by fraud and misrepresentation and hence his desire to be granted the orders sought herein.
13. In support of that position the Applicant avers at his son one Peterson Mwaniki Maina is dead and that he desires to bury his body in the suit property. It is apparent from his pleadings that the Applicant has not been in occupation and/or possession of the suit property for a considerable period of time for he avers as follows at Paragraphs 12 to 17 of the Supporting Affidavit:
 12. That I approached the County Commissioner, Tetu for security during my son's burial and was advised to liaise with the Assistant County Commissioner, Tetu;
 13. That the Assistant County Commissioner, Tetu, summoned Simon Nderitu Wamae, the Respondent, on 12th January, 2022 to a joint meeting during which he declared the land to be his while objecting to the intended burial;
 14. That Simon Nderitu Wamae guaranteed my bank loan from National Bank of Kenya in 1978 or thereabouts which was secured by my title to the suit land as collateral;
 15. That whereas the Applicant and Respondent both hail from Mung'aria, the Respondent relocated to the neighbouring Muruguru within the former Nyeri Municipality;
 16. That the Respondent is well known to my family as we hail from the same place and I approached him because he was then a banker working with the Kenya Commercial Bank in Nyeri; and
 17. That I have reason to believe that the Court in Civil Suit No. 31 of 1987 at the Chief Magistrate Court at Nyeri and records at the Nyeri Land Registry disclose the Respondent's fraud and misrepresentation used to procure an illegal title to the suit land including evidence that the Applicant is the lawful and legal holder of title to the suit land.
14. Without explaining how the fraud was perpetrated and/or giving the background to the said Civil Suit No. 31 of 1987, the Applicant then introduces the Court at Paragraph 18 of his Affidavit to a series of documents in Sub-paragraphs a to z and aa to bb to the Supporting Affidavit which are said to speak to the said loan and dispute over the suit land. The Applicant thereafter asserts that he is reliably advised by a trusted confidant, which advise he holds to be true that the said suit in the Chief Magistrates Court at Nyeri is sustained by the Respondent's fraud and misrepresentation.
15. As it were, the production of the said suit No. 31 of 1987 was one of the issues raised at Prayer No. 7 of the application herein. The file was subsequently retrieved and produced herein. A perusal of the said suit reveals that it was filed by the Respondent as against the Applicant herein and that the matter proceeded to full hearing.
16. I have painstakingly gone through that old file and the proceedings therein. From a perusal thereof, it is apparent that both Parties and their Advocates appeared before the Honourable Babu Achieng, Senior Resident Magistrate on July 6, 1987 whereupon by consent, the matter was referred to arbitration by



one Wachira Advocate who was required to arbitrate on the dispute and deliver an award within 60 days.

17. The award was not ready in time and the Court extended the time granted to the Arbitrator a number of times. The award dated 7th November, 1987 was finally read to the parties in open Court on 8th February, 1988. Aggrieved by the said award, the Applicant herein filed an application to have the same set aside. That application was dismissed by the Court with costs on 20th July, 1988 on which date the Court entered Judgment in favour of the Respondent herein in terms of the award.
18. Once again, the Applicant herein was dissatisfied and he filed Nyeri HCCA No. 36 of 1988. Having considered the Appeal, the Honourable Justice P. K. Tunoi (as he then was) rendered a short Judgment as follows:

“The Judgment in terms of the award was entered on 20th July, 1988 after an application to set aside the award filed herein by Mr. Wachira Advocate was dismissed.”

The Judgment is within and in accordance with the award and not in excess of it.

The Appeal is incompetent as in the first instance, the Appellant has no right of appeal from the Judgment and decree of the trial Court.

As the Appellant’s application to set aside the award has been dismissed and Judgment entered in favour of the Respondent in terms of the award, there is no Right of Appeal under Order 45 Rule 17(2) of the *Civil Procedure Rules*.

The Appeal is incompetent and is dismissed with costs.”

19. It is clear from a perusal of the record that a decree was thereafter extracted in Nyeri SRM CC No. 31 of 1987 and that the Applicant herein failed to settle the decretal sum. By an application for execution of decree dated 3rd October, 2003, the Respondent’s Advocate sought to have the decretal sum by then in the sum of Kshs.265,081.45 by way of sale by public auction of the parcel of land known as Aguthi/Mung’aria/562 measuring 0.60 Ha. and registered in the name of the Judgment-debtor. The suit property was eventually sold at a public auction conducted by Messrs Hippo General Merchants (the 4th Interested Party herein) on November 15, 2007. On February 8, 2009, the property was registered in the name of the Respondent herein
20. Arising from the foregoing, it was clear to me that the Miscellaneous Application as filed by the Applicant herein was instituted out of mischief and in an apparent attempt to mislead the Court and abuse its processes. The process which extinguished the Applicant’s interest and/or rights in the suit property was a lawful process in which he duly participated.
21. The Applicant was sued by the Respondent in Court and he participated in the process and agreed to have the matter referred to Arbitration. He participated in the arbitration process. The award of the Arbitrator was read in his presence and being dissatisfied therewith, he sought to set it aside. His efforts failed and an appeal preferred to the High Court equally failed. He did not appeal the Judgment of the High Court and he cannot be heard now to come to this Court through another suit claiming the title was taken away from him fraudulently and in an unlawful manner.
22. As a matter of fact the issues being raised in this Miscellaneous Application had already been dealt with and conclusively determined by a Court of competent jurisdiction. In that respect, I am in agreement with the Respondent that the matter is res judicata. The doctrine of res judicata may be pleaded by way of estoppel so that where a Judgment has been given, future and further proceedings are estopped.



23. As the Court of Appeal stated in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain Justice.”

24. It follows that the attempt by the Applicant to mislead the Court on the guise that he is being stopped from burying his son on a parcel of land wrongly taken from him must now be brought to an end. This Court will afford the Respondent closure and respite from the specter of being haunted and hounded by this vexatious Applicant.

25. The Motion dated 27th January, 2022 is accordingly dismissed with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 26TH DAY OF MAY, 2022.

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J. O. OLOLA

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

Court assistant - Kendi

