



**Gikunda (Suing As The Legal Representative Of M’Inoti M’Magiri) v M’Magiri
(Sued as the Legal Representative of Magiri Kwambara) & 3 others (Environment
and Land Appeal 77 of 2021) [2022] KEELC 2857 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 77 OF 2021**

CK NZILI, J

MAY 11, 2022

BETWEEN

**GREGORY GIKUNDA APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF M’INOTI M’MAGIRI**

AND

**M’RINGERA M’MAGIRI 1ST RESPONDENT
JACOB KIRUNJA 2ND RESPONDENT
WILSON MURIITHI 3RD RESPONDENT
GEORGE KAARIA 4TH RESPONDENT**

JUDGMENT

A. Pleading

1. The appellant in the lower court as the legal representative of the estate of M’Inoti M’Magiri Kwambara sued the 1st respondent claiming that his late father had bought 4 acres in Abothuguchi Mariene which during the land consolidation had been amalgamated with the land of the 1st respondent’s father and the 1st defendant who held the same as a trustee for his son in the consolidated land registered as L.R Abothuguchi/Mariene/162 measuring approximately 8.75 acres.
2. Following the death of the deceased M’Inoti M’Magiri, the appellant averred the 1st respondent while aware of the trust filed a succession cause no. 117 of 2004, breached the trust, refused to factor in, disclose and or transfer the land to the appellant estate and allegedly started dealing with the suit land against the wishes and interests of the estate of the appellant’s deceased father while acting in tandem with the 2nd, 3rd and 4th respondents. The appellant fought for declaratory orders that the suit land was held in trust for the estate of his late father and did not form part of the succession cause.



3. Alongside the plaint, the appellant also filed an application dated March 15, 2021 seeking for temporary orders of inhibition against the title which was opposed by the respondents through a replying affidavit sworn on May 24, 2021, inter alia attaching a copy of the affidavit in protest and the judgment in Meru High Court Succession Cause No. 117 of 2007, claiming the instant suit was res judicata.
4. The respondents also filed a notice of preliminary objection dated March 24, 2021 whose basis was that the suit was offended to section 7 of the [Civil Procedure Act](#) and was an abuse of the court process.

B. Written Submissions

5. Parties filed written submissions dated April 12, 2021 and April 30, 2021 respectively regarding both the application and the preliminary objection.

C. Ruling by the Trial Court

6. By a ruling dated May 31, 2021 the trial court struck out both the suit and the notice of motion dated March 15, 2021 for being res judicata triggering the current appeal.

D. The grounds of appeal

7. The appellant appeals that the trial court failed to appreciate the concept of trust was based on existence of evidence and fact determinable by an Environment and Land Court and not a Probate Court hence there was no res judicata; upheld a preliminary objection based on res judicata which required cogent evidence which was unavailable at the time; the court failed to appreciate it was the first competent court to be approached by the appellant on the issue; failed to appreciate res judicata should be determined on case to case basis and in this particular case, there had been no finality principle; summarily dismissed the suit without giving parties in the succession cause an opportunity to be heard; failed to look at the submissions, law, evidence and the authorities submitted.

E. Written Submissions

8. With leave of the court parties filed written submissions to this appeal dated October 29, 2021 and December 18, 2021 respectively.
9. The appellant submitted that the issues for determination are; whether the suit sits on all four corners on issue and cause of action, with res judicata as the trial court found; whether the High Court had jurisdiction to make a conclusive determination on the trust claims; whether the trial court in decision was bad in law and lastly, who was entitled to costs.
10. On the first issue the appellant submitted that res judicata principle was based on balancing the finality of litigation and the public interest of delivering justice to litigants. Reliance was placed on [Machakos Golf Club Ltd vs Machakos Teachers College & another](#) (2021) eKLR, [IEBC vs Jane Cheperenger & 2 others](#) (2015).
11. The appellant submitted that going by the Probate Court's decision to clearly stated that the issue of consolidation of land and trust required succinct evidence before the right forum which forum would only have been the Environment and Land Court meaning that the issue of trust was not a conclusively determined in High Court.
12. Further, the appellant submitted that going by a plethora of cases, Probate courts have held that they are not the most appropriate forums for determining complex issues of trust and land ownership.



13. Reliance was placed on *Joyce Cherop Kaspondoy and 609 others vs Kenya Power & Lighting Co. Ltd* (2019) eKLR, *Re estate of Chepsongok Tapsambu (deceased)* (2021) eKLR, *KCB Ltd vs Muiri Coffee Tea Estate Ltd & another, Re-estate of Samuel Kathieri deceased* (2019) eKLR, and *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* (2014) eKLR and in the U.S.A Supreme court *Corla Jackson vs Gmac Mortgage Corporation El AL*.
14. On the other hand, the respondent submitted the Probate Court conclusively determined the issues which came before the trial court with viva voce evidence of the appellant as a protestor and a scene visit report by the District Land Surveyor yet two years and five months later, the appellant purported to re-open the issues by filing a fresh suit before the trial court over L.R No. Abothuguchi/Mariene/162 using similar arguments and or allegations as used in the affidavit of protest before the Probate Court which amounted to abuse of office and was res judicata.
15. The respondent further submitted that the appeal was a veiled attempt to urge this court to sit on appeal over the decision of a High Court judge, which jurisdiction this court lacks since it was of equal status as the High Court under article 162 (2) of *the Constitution*, and that the decision by the high court could only be appealed against before the Court of Appeal and not by filing the suit in a lower court and now seeking to have this court determine the issues.
16. Reliance was placed on *Nicholas Njeru vs Attorney General & 8 others* (2013) eKLR.
17. The respondent submitted even though the appellant had clothed their claim in a different style, he was alleging trust, the appellant could not prove that his father had purchased a portion of land measuring four acres or that there had been consolidation with the land of the respondent late father; or that his late father was occupying four acres during his life time or that his family continued to occupy a portion measuring four acres as left out by his late father.
18. The respondent also submitted that if the court was to determine the substantive issues in the matter before the trial court, the court would have to determine the same issues as determined by the High Court in the Succession Cause.
19. It was further submitted that whether the appellant's claim was on trust or not, facts on the ground shall never change given the scene visit report at the Probate Court exhibits produced the appellant had failed to prove his claim which in any event, was conclusively determined by the Probate court hence this court lacks the jurisdiction to determine the issues.
20. In sum, the respondent urged the court to find that the appellant had failed to establish sufficient grounds to warrant this court to overturn the lower court ruling.

F. Role of Appellate Court

21. This being a first appeal the court is mandated under the law to re-hear, re-hearse and re-evaluate the lower court record and come up with independent findings and conclusions on both facts and law. See *Selle & another vs Associated Motor Boat Co. Ltd & others* 1968 E.A 123.

G. Issues for Determination

22. The issues commending themselves for my determination are:-
 - i. Whether the respondent preliminary objection before the trial court was a pure point of law.
 - ii. If the trial court was right in law in finding the appellant's suit was resjudicata.



- iii. What is the jurisdiction of Environment and Land Court vis a vis High Court on disputes over land belonging to the deceased.
 - iv. What is the order as to costs.
23. In *Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1964) EA 696, a preliminary point of law 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 issue may dispose of a suit.
 24. Before the trial court, the appellants had brought a suit based on amalgamation of the suit land during the land consolidation process and trust which the respondents had allegedly breached and instead ignored to honour the interests of the estate of the appellants deceased father at the probate court.
 25. The appellant had sought for declaratory orders that the suit land was held in trust for the estate of the appellant's father. The respondents instead of filing a defence to the suit filed a preliminary objection stating that the suit was offended to Section 7 of the *Civil Procedure Act* and therefore was an abuse of the court process. In order to support the preliminary objection, the respondent relied on a replying affidavit sworn by Mr. Ringera M'Magiri on March 24, 2021 attaching a copy of the affidavit in protest and the judgment in Meru High Court Succession Cause No. 117 of 2007.
 26. At paragraph 8 of the said affidavit, the respondents said that the distribution of land Parcel No. Abothuguchi/Mariene/162 in accordance with the confirmation of grant by the High Court was at an advanced stage and the motive of the appellant in those proceedings was to halt or frustrate the implementation of the confirmation of grant.
 27. At paragraph 9 thereof the respondent stated that the appellant's suit was res judicata and a gross abuse of the process of court.
 28. For the doctrine of res judicata, Section 7 of the *Civil Procedure Act* provides that the court should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and against the instant case to ascertain:-
 - i. What issues were really determined in the previous case.
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous suit was determined by a court of competent jurisdiction.
 29. Before the trial court, the respondents did not file any defence to challenge the factual issues as raised in the plaint.
 30. There were no pleadings, list of witnesses, witness statements or list of documents accompanying a defence in particularly the entire proceedings and the pleadings in the previous suit.
 31. Other than the preliminary objection and the replying affidavit filed on March 24, 2021 attaching the appellant's affidavit in protest to confirmation of grant sworn on June 22, 2007, a limited grant issued on April 5, 2007 and the judgment in Meru HCC Succession Cause No. 177 of 2004, there were no other materials in opposing the suit.
 32. In *Bernard Mugo Ndegwa vs James Nderitu Gitbae & 20 others* (2010 eKLR, the court held that in determining res judicata, the matter in issue must be identical in both suits, the parties must be the



same, the claim must be the same or the title the same, there must be concurrence of jurisdiction and that there must be finality of the previous suit.

33. In *E.T vs A.G & another* (2012) eKLR, the court held it must always be vigilant to guard against parties evading the doctrine of litigation by introducing a new cause of action so as to seek the same remedy before the court and that the test should be whether the plaintiff in the second suit was trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction.
34. In this suit the respondent take the view that the issues of the alleged land purchase, consolidation, amalgamation, occupation and trust were determined by the Probate Court to finality and that the appellant was now re-opening the same issue in which case would be an abuse of the court process and offend section 7 of the *Civil Procedure Act*.
35. The appellants' plaint dated March 15, 2021 at paragraph 5 raised three issues of purchase by a son of a deceased land and amalgamations of his land with that of his father and subsequent registration of the two parcels as one unit in which his four acres was combined with 4.75 acres and became L.R No. Abothuguchi/Mariene/162 totaling 8.75 acres but which after the death of his father was alleged shared out among the beneficiaries the appellants share included without first severing his portion of 4 acres which remained held in trust for the appellant's by the deceased father's estate.
36. The appellants at paragraph 7 of the plaint pleaded the issues of trust and the pending Succession Cause No. 117 of 2007. He clearly pleaded there had been a breach of trust, fraud, dishonesty and or misrepresentation of the facts by the respondent which he knew hence the prayer for declaratory orders that the estate as registered was inclusive of his 4 acres which remained held in trust at all times and it ought to be surrendered and transferred to the rightful owner.
37. Instead of pleading to the facts herein, the respondent filed a preliminary objection dated 24.3.2021 alongside a replying affidavit opposing the application dated 15.3.2021 seeking for inhibition orders to forestall the implementation of the confirmed grant until the determination of the suit.
38. The *D.T Dobie & Co. (K) Ltd vs Joseph Mbaria Muchina & another* (1980) eKLR, it was held a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal, unless it appeared hopeless, that it was plainly and or obviously disclosed no cause of action.
39. In this matter, the proceedings, pleadings and documents produced in the previous suit were not availed to the trial court before it made a finding that the suit was res judicata and an abuse of the court process.
40. Even looking at the Probate Courts judgment it is obvious the appellant was a beneficiary of the estate of the deceased but had raised a claim of purchase, consolidation and amalgamation of his four acres with that of his deceased grandfather, which was allegedly being held in trust but was now being shared out among all the beneficiaries not taking into account his share of four acres. The Probate Court clearly made a find that such a claim when raised needed succinct evidence and ventilation before another forum.
41. The Supreme Court of Kenya in *Republic vs Karisa Chengo and 2 others* (2017) eKLR held that where a court takes upon itself to exercise a jurisdiction which it did not possess, its decision amounted to nothing and that jurisdiction must be acquired before a judgment could be given.
42. *In Re-estate of Stanley Mathenge Ruriga (deceased)* 2018 eKLR L.W Gitari J held that the issue of whether a trust existed or not was an issue which must be determined in a separate suit since the issues of ownership of land and declaration of trust are matters which do not fall under the preamble of the



Law of Succession Act Cap 160. This golden thread is evidence in the following case law by different eminent judges in our realm. See John Mbua Muhtoni & another vs Ruth Muthoni Kariuki (2017) eKLR, Joseph Kaberia Kumar vs Tony Mwenda Muthaura (2021) eKLR. Re- Estate of M'Mrurianki M'Mugwika (deceased) (2019) eKLR, Joseph Koori Ngugi vs Stephen Ndichu J, Makima (2017) eKLR, re estate of Julius Ndubi Javan (deceased) (2018) eKLR.

43. Applying the above persuasive authorities what is coming out clearly is that the jurisdiction of the ELC court as spelt out under article 162 (2) (b) of the Constitution and the Environment and Land Court Act covers any other disputes touching on land and environment apart from the specified disputes under section 13 of the Act.
44. Similarly section 9 (a) of the Magistrates Court Act 2015 allows designated magistrates to exercise such jurisdiction so long as the subject matter falls within its pecuniary and territorial jurisdiction.
45. As regards the property of a deceased person as in the instant case Musyoka J in Re Estate of Mbai Wainaina (deceased) held that the mandate of the Probate Court under the Law of Succession Act Cap 160 was limited and did not extend to determining the issues of ownership of property and declaration of trusts. The court held it was not a matter of the Probate Court being in competent to deal with such issues but rather the provisions of the Act finding it an inconvenient mechanism for the determination of such issues.
46. This perhaps was the reasoning behind Gikonyo J in Meru Succession Case No. 117/2004 making a finding that there was need for succinct evidence being ventilated in a different forum.
47. In Re estate of Alice Mumbua Mutua deceased (2017) eKLR Musyoka J. held the claims by and against third parties were for resolution outside the framework set out by the Law of Succession Act Cap 160 and the Probate and Administration Rules and that the same should be resolved through the legal infrastructure set out under the Civil Procedure Act, and where they occur after the confirmation of grant the Probate Court would be in most cases functus officio.

H. Conclusion

48. In the circumstances the finding on issues No. (1) & (2) is that the respondents' point of preliminary objection dated March 24, 2021 was not based on a pure point of law for it required evidence and facts. See Oraro vs Mbaja (2005) eKLR.
49. On the 3rd issue the trial court was wrong in declining jurisdiction when the issues raised in the plaint had not been conclusively determined by a court of competent jurisdiction and therefore were properly the right court.
50. The upshot is that the appeal herein has merits. The same is allowed with costs to the appellant. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT V THIS 11TH DAY OF MAY, 2022

In presence of:

Murira for Ngunjiri for appellant

Masamba for respondent

HON. C.K. NZILI

ELC JUDGE

