



REPUBLIC OF KENYA



Mwangi & another v Baragu & 6 others (Environment and Land Appeal 54 of 2021) [2022] KEELC 12754 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 54 OF 2021**

**JO OLOLA, J
SEPTEMBER 28, 2022**

BETWEEN

CHARITY WANJIKU MWANGI 1ST APPELLANT

BENJAMIN MAINGI KARIMA 2ND APPELLANT

AND

ELIJAH NUNGU BARAGU 1ST RESPONDENT

ALI NDIRITU NJOROGE 2ND RESPONDENT

ASUMAN NGUGI 3RD RESPONDENT

SALIM NJOROGE SAIDI 4TH RESPONDENT

SARAH WAMBUI NDIRITU 5TH RESPONDENT

JOHNSON KIRATU WACHIRA 6TH RESPONDENT

LYDIA WAMUCHII 7TH RESPONDENT

RULING

1. By the notice of motion dated and filed herein on February 3, 2022, the two appellants pray for a temporary order of injunction restraining the 6th respondent, his servants and/or agents from entering into, trespassing on or in any other way interfering with the plaintiff's title, quiet possession or their rights over all the those properties known as Mahiga/Kihome/1501, 1504, 1505 and 1506 pending the hearing and determination for the appeal herein.
2. The application which is supported by an affidavit sworn by the 2nd appellant Benjamin Maingi Karimi is premised on the grounds that:-



- (a) This appeal emanates from Nyeri CMC ELC 42 of 2021 where the appellants as plaintiffs sued the respondents in respect of the suit properties;
 - (b) In the said suit the plaintiffs had sought for and had been granted an order for the maintenance of the status quo which subsisted until the conclusion of the matter on December 9, 2021;
 - (c) The aforesaid matter was determined by way of a ruling on a preliminary objection which was upheld and which has given rise to this appeal;
 - (d) With the expiry of the orders to maintain the status quo, the threats that existed then are still rife and attackers have become rampant, constant and consistent;
 - (e) The applicants have been in possession, occupation and are residents of the suit parcels of land from sometime in 2016 and have made extensive developments that are in danger of destruction;
 - (f) There is an arguable appeal hence the need to safeguard the suit properties and the appeal from being rendered nugatory;
 - (g) The appellants are ready to be bound by any orders as to security that may be found reasonable to enable them diligently prosecute the appeal;
 - (h) It is just and meet so to order.
3. Sarah Wambui Ndiritu and Johnson Kiratu Wachira (the 5th and 6th respondents respectively) are opposed to the application. By their notice of preliminary objection dated July 12, 2021 but filed herein on 10th February 2022, the two Respondents object to both the application and the Appeal on the grounds:
1. That this honourable court lacks jurisdiction to hear this suit on the grounds that the plaint in Nyeri CMCC 42 of 2021 dated July 5, 2021 and the memorandum of appeal herein dated December 17, 2021 are *res judicata* the ruling of Hon Lady Justice Mumbua T Matheka dated February 6, 2020 that the appellants/applicants are not protected under section 93 of the [Law of Succession Act](#) Cap 160 Laws of Kenya;
 2. That the honourable court lacks jurisdiction since the issues and orders sought in the instant plaint are similar to the orders sought by the Appellant/applicants herein in Nyeri Court of Appeal Civil Appeal No 52 of 2020 which suit was withdrawn by the appellants/applicants thus leaving the ruling of Hon Lady Justice Mumbua T Matheka dated 6th February, 2020 unchallenged;
 3. That the honourable court lacks jurisdiction to hear an Appeal of a decision (of a) Judge of concurrent jurisdiction and in particular the ruling of Hon Lady Justice Mumbua T Matheka dated February 6, 2020;
 4. That the alleged subject matter of the instant suit all the land known as LR Mahiga/Kihome/1503/1504/1505 and 1506 are none existent by virtue of the Judgment of the ruling (sic) or Hon Lady Justice Mumbua T Matheka dated April 19, 2018 hence no orders can issue alongside them and the suit herein is an outright abuse of the honourable court's process; and
 5. The suit is fatally defective and the case presented herein is bad in law, vexatious, scandalous, frivolous and an abuse of the court Process.



4. I have carefully perused and considered the application as well as the preliminary objection thereto. I have similarly perused and considered the submissions placed before me by the Learned advocates representing the appellants herein. I was unable to find any submissions by the respondents.
5. The 5th and 6th respondents have objected to both the appeal and the application dated February 3, 2022 on the main ground that the same are *res judicata* the ruling of the Honourable Lady Justice Mumbua Matheka delivered on February 6, 2020 in Nyeri High Court Succession Cause No 307 of 2003; *in the Matter of the Estate of the late Wachira Githiomi – Deceased.*
6. The doctrine of *res judicata* as set out in section 7 of the *Civil Procedure Act* ousts the jurisdiction of a court to try any suit or issue which has been finally determined by the Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
7. The appeal herein arises from a ruling delivered on December 9, 2021 in Nyeri CM ELC Case No E042 of 2021. By that ruling the trial Court did strike out the appellants' suit after upholding a preliminary objection raised as herein by the 5th and 6th respondents to the effect that the plaintiff's suit was *res judicata* the ruling delivered in Nyeri High Court Succession Cause No 307 of 2003.
8. In their suit filed in the subordinate Court, the appellants had contended that they had acquired the suit parcels of land as bona fide purchasers for value from the then registered proprietor (the 1st respondent herein). The appellants had asserted that by the time the suit properties were transferred to themselves by the 1st respondent, they were unaware of the existence of the said Nyeri High Court Succession Cause No 307 of 2003. It was only later that the appellants came to learn that the 1st respondent had on his part acquired the suit parcels as a purchaser from the 2nd, 3rd and 4th respondents who had themselves been registered as proprietors upon transmission as beneficiaries pursuant to the succession cause.
9. On account of those facts, the appellants had sought an order of injunction to issue restraining the respondents jointly and severally from entering upon or in any way interfering with the appellants' quiet possession of the suit properties. The appellants further sought a declaration to issue to the effect that they are *bona fide* purchasers for value without notice and that their rights were specifically protected under section 93 of the *Law of Succession Act.*
10. As it turned out prior to instituting the suit in the Lower court the grant giving rise to the transmission and hence the titles of the 1st to 4th respondents were revoked following an application made by the 5th respondent herein. When the appellants learnt of the revocation, they filed an application dated May 7, 2018 in the said Succession Cause urging the court to review its orders of 19th April, 2018 and to restore the orders of 14th July, 2005 and October 7, 2008 issuing the grant of letters of administration and confirming the grant respectively.
11. That application by the appellants was premised inter alia on the following grounds:
 - (i) That upon confirmation of grant on October 7, 2008, the beneficiaries of LR No Mahiga/Kihome/391 shared out the said land parcel;
 - (ii) That LR No Mahiga/Kihome/391 was subdivided into 6 portions of land, being LR No Mahiga/Kihome/1501, 1502, 1503, 1504, 1505, and 1506;
 - (iii) That the owners of LR No Mahiga/Kihome/1503, 1504, 1505 sold their respective parcels to one Elijah Ndung'u Baragu;



- (iv) That Elijah Ndung'u Baragu has subsequently sold LR No Mahiga/Kihome/1503, 1504 and 1505 to the applicants;
 - (v) That LR No Mahiga/Kihome/1506 is registered in the name of Said Salim and the applicants hold a beneficial interest in the said property;
 - (v) Under section 93 of the [Law of Succession Act](#) the applicants who are in possession of LR No Mahiga/Kihome/1503, 1504, 1505 and 1506 are protected by law;
 - (vi) That the orders of April 19, 2018 will prejudice the applicants who never participated in the proceedings and were not notified of the existence of the court proceedings; and
 - (vii) That the applicants have commenced horticultural farming on the properties, fenced the same at great expense, build a semi-permanent house and are rearing sheep and have planted over 10,000/- blue gum trees.
12. Having heard the application made by the appellants and in a ruling delivered on February 6, 2020, the Honourable Lady Justice Mumbua Matheka dismissed the same having found that the titles to the four parcels of land were obtained through fraudulent means by the 2nd respondent herein and other persons for the sole purpose of taking away the estate of the late Wachira Githiomi from its rightful beneficiaries.
13. As a matter of fact the Learned Judge further dismissed the appellants contention that they were entitled to protection under section 93 of the [Law of Succession Act](#) stating at Paragraph 17 of the ruling as follows:
- “ 17. Coming back to the Applicant, there is sufficient jurisprudence that a title deed obtained through a fraudulent succession cause cannot be covered by section 93 of the [Law of Succession Act](#). If that were so then every rogue, crook and charlatan, who was fast enough to find a vulnerable deceased's estate would go ahead, obtain letters of Administration and pass his ill gotten title to other parties, hence disinheriting the rightful heirs. It is my view that that is why section 76 bears no limitation to time as to when a summons for revocation of grant may be brought ...”
14. Some one and half years after the learned judge pronounced herself on the issues, the appellants moved to the subordinate court on July 5, 2021 seeking an order of injunction to issue against the respondents as well as a declaration, that they are bona fide purchasers for value without notice and that they are again, specifically protected under section 93 of the [Law of Succession Act](#).
15. That was clearly a misguided move as the subordinate court could not be expected to make a determination on a matter on which the High Court had already pronounced itself. In their submissions in support of their application herein, the appellants contend that the application for revocation of the grant was not served on all the interested parties as required under the probate rules and that its prosecution and eventual orders were therefore without their knowledge and participation.
16. While the grant may have been revoked before the appellants were heard, it was not entirely true that the court had denied them a hearing as purported in their submissions. Their application dated May 7, 2018 was heard and a ruling delivered thereon on February 6, 2020. Where the appellants were aggrieved by the ruling, the option available was not to re-open the issues in a different forum but to file an appeal against the decision.



17. At 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, an outcome 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.”

18. Arising from the foregoing and taking all the circumstances of this case into account, I am persuaded that the subject matter of this appeal and the motion dated February 3, 2022 are res judicata the proceedings and ruling delivered in Nyeri High Court Succession Cause No 307 of 2003 on 6th February, 2020. Both are hereby struck out with costs to the 5th and 6th respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Ms Miriti for the Applicant

Ms Kiogothi holding brief for Kago for the 6th and 7th Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

