



**Chelanga v Kigumi & 3 others (Environment & Land Case
E033 of 2022) [2023] KEELC 481 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E033 OF 2022
EO OBAGA, J
FEBRUARY 2, 2023**

BETWEEN

ABRAHAM KIPKOSGEI CHELANGA PLAINTIFF

AND

SALOME WANJIRU KIGUMI 1ST DEFENDANT

HIGHRISE DESIGNERS COMPANY LIMITED 2ND DEFENDANT

BENSON KIMEMIA 3RD DEFENDANT

SYLVIA WAMBUI 4TH DEFENDANT

RULING

1. This is a ruling in respect of two separate applications which are both dated 22nd June 2022. The two applications seek to have the Plaintiff's suit struck out on similar grounds namely that the suit is res judicata and does not disclose a reasonable cause against the Defendants/Applicants.
2. The Plaintiff/Respondent had purchased two properties belonging to the Estate of the late David William Kigumi Kimemia who died on 15th July, 2003. The properties purchased included one acre comprised in Pioneer/Ngeria Block 1114 (EATEC) and Eldoret Municipality Block 15 (West Farmers) 1020. The properties were purchased from Joram Kimemia, one of the administrators of the Estate of the late David William Kigumi Kimemia.
3. Sometime in January 2019, the Respondent discovered that the 1st Applicant had forged a general power of Attorney purportedly given to her by Joram Kimemia, the basis of which she sold Pioneer/Ngeria Block 1114 (EATEC) to the 2nd Respondent. The Respondent instituted both Civil Criminal Proceedings against the 1st Respondent.
4. The Respondent contends that upon being subjected to Civil and Criminal prosecution, the 1st Applicant conspired with the 3rd and 4th Applicants to file an application for revocation of the grant



which had been issued to Joram Kimemia and the 1st Applicant. The Applicant applied and was joined in the succession cause as an interested party. The application for revocation was finally heard and a judgement delivered on 27th May, 2021. The grant which had been given to Joram Kimemia and the 1st Applicant was revoked and in place thereof, the 3rd and 4th Applicants were given grant of letters of administration of the Estate of the deceased on 10th March, 2022.

5. In the meantime, Joram Kimemia had filed a suit against the 1st and 2nd Applicants in ELC No. 9 of 2019. This suit has since been withdrawn. It is on the basis of the revoked grant that the Applicants contend that the Respondent's suit is res judicata and that it does not raise a reasonable cause of action.
6. It is the Respondent's contention that ELC No. 9 of 2019 having been withdrawn, he has not offended the Provisions of Section 6 of the Civil Procedure Act and further that he has not offended Section 7 of the Civil Procedure Act as the dispute before this court was not determined by the succession cause in Eldoret succession cause No. 27 of 2003 as that court does not have jurisdiction to deal with the current suit.
7. All the parties filed submissions. I have considered the two applications as well as the submissions filed. The issues which emerge for determination are firstly, whether this suit is res judicata. Secondly, whether this suit discloses reasonable cause of action or whether it is an abuse of the process of court. Thirdly, whether the suit is statute barred and fourthly, who should bear the costs of the applications.
8. The 2nd Applicant did not pursue its contention that this suit is sub-judice. This is because ELC 9/2019 was withdrawn before the hearing of these applications.
9. On whether this suit is res judicata, the law is clear that the issues being raised in the latter case must have been raised before the former suit and were finally decided in the former suit. The court which determined the former suit must be competent to determine the subsequent suit.
10. In the instant case, the issues which were dealt with in the succession cause did not determine the issues which the Respondent is raising in this suit. The succession court is not competent to deal with land issues. What constitutes res judicata was aptly set out by the Court in Independent Electoral & Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR, where it was stated as follows: -

“Thus, for the bar or res-judicata to be effectively raised and uphold on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantial in issue in the former suit.
- b) That the former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The court went on to state on the rule of the doctrine:-

“The rule or doctrine of res-judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specific or 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 force to obtain as 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.”

11. On whether the Respondent’s suit raises a reasonable cause of action, it is important to note the context in which the Respondent purchased the two properties. The two properties were purchased while Joram Kimemia had a confirmed grant. The sale of one of the two properties to the 2nd Applicant prima facie was fraudulent in that no general power had been given to the 1st Applicant to sell it to the 2nd Applicant when she already was one of the administrators of the Estate of David Willam Kigumi Kimemia. Even the succession court in its judgment maintained a studious silence in the whole succession Saga.
12. The Estate of the deceased has not been distributed in accordance with the new grant which was issued on 10th March, 2022. Joram Kimemia will finally be entitled to a share of his father’s estate. If this comes to pass, the Respondent will be entitled to what he lawfully purchased were it not for the revocation of the initial grant which appears to have been engineered with ulterior motives.
13. Striking out of a pleading is a drastic step which can only be done in the clearest of the cases. In *D. T. Dobie & Co K) Ltd v Joseph Mbaria Muchira* CA 37 of 1978 [1982] KLR, the Court stated as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
14. The 2nd Applicant contends that the Respondent’s suit is frivolous, scandalous and vexatious. The Court of Appeal in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR defined the three terms as follows:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action” See *Trust Bank Limited v Amin Company Ltd & Another* [2000] KLR 164.”
15. The Respondent’s suit is neither frivolous, vexatious nor scandalous. Equally, it is not an abuse of the process of the court. On whether the suit is statute barred, the Respondent is clear in his pleadings that he discovered fraud in January, 2019 when he found out that the 1st Applicant had purported to sell one of the suit properties to the 2nd Applicant. Time does not start running in fraud cases until discovery of the fraud. The Respondent will not have filed a suit early than January, 2019 as he had no reason to do so having purchased the two properties based on a confirmed grant though the grant was subsequently revoked. This case is therefore not statute barred.



16. From the above analysis, it is clear that the two applications are devoid of merit. The same are dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2ND DAY OF FEBRUARY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mukhabani for Plaintiff/Respondent.

Mr. Oduor for 1st, 3rd and 4th Defendants.

Mr. Mogambi for Mr. Mathai for 2nd Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

2ND FEBRUARY, 2023

