



**Karumba & another v Albushra Real Estate Limited; Kungu & another (Interested Parties)  
(Environment & Land Case E223 of 2021) [2023] KEELC 15847 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15847 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E223 OF 2021  
OA ANGOTE, J  
MARCH 2, 2023**

**BETWEEN**

**JOHNSON MUCHAI KARUMBA ..... 1<sup>ST</sup> PLAINTIFF**

**CHRISTOPHER KARUMBA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALBUSHRA REAL ESTATE LIMITED ..... DEFENDANT**

**AND**

**PETER MUCHAI KUNGU ..... INTERESTED PARTY**

**ROSE NJERI NDUNGU ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is a preliminary objection dated August 27, 2021 contending that:
  - a. The plaintiffs and the defendant do not have privity of contract regarding the Lease created on L.R No. 1/603 (Original No. 1/293(i) Folio 286/1 No. 14932, Wood Avenue (hereinafter ‘the suit property’).
  - b. The suit and the application disclose no reasonable cause of action.
  - c. The suit property is part of the estate of the Late Kungu Karumba which is the subject of the matter of Succession Cause No. 138 of 1983 in the Family Division of Milimani Law Courts. The Letters of Administration Intestate have been issued to Peter Muchai Kungu, Rose Njeri Ndungu and Hannah Wairimu Kungu, but the grant is yet to be confirmed and hence distribution of capital assets is yet to be undertaken.



- d. It is trite law that the powers to enforce, by suit or otherwise, all causes of action, with respect to the estate of a deceased vests in the personal representatives and not the beneficiaries and hence the beneficiaries of an estate cannot purport to file the suit and application herein.
  - e. The plaintiffs lack the necessary locus to institute the instant suit and application herein.
  - f. The entire suit is misadvised and incompetent and ought to be struck out.
  - g. The suit before the Court is wanton abuse of court process and must be dismissed in limine.
2. The Preliminary Objection was heard by way of written submissions. The Defendant filed its submissions on September 8, 2022. The first issue for determination was stated as: Whether the Court has Jurisdiction to determine the issue.
  3. Relying on the cases of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others* [2018] eKLR, the defendant submitted that this court does not have jurisdiction as the suit as set out by the plaintiffs is a succession matter.
  4. It was submitted that the plaintiffs, who are beneficiaries of the Estate of the Late Kungu Karumba (of which the suit property is part of) were dissatisfied with the leasing of the suit property to the defendant and that issues raised in the current suit should have been addressed by the High Court and not in the Environment and Land Court.
  5. The second issue for determination was stated as: Whether the plaintiffs have locus standi to institute the present suit. The defendant relied on the provisions of sections 3 and 82 of the *Law of Succession Act* and the cases of *Beatrice Wambui Kiarie* (supra), *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR and *Hawo Shanko vs Mohamed Uta Shanko* [2018] eKLR.
  6. It was submitted that the plaintiffs have instituted the suit in their capacity as beneficiaries while the law is clear that it is only the personal representatives of an estate that have the requisite standing to institute such a suit. Consequently, it was submitted, the suit should be struck out for being defective ab initio.
  7. The third issue for determination was stated as: Whether the suit is res judicata. Relying on section 7 of the *Civil Procedure Act* and the case of Independent *Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the defendant submitted that the plaintiffs' suit is res judicata.
  8. It was submitted that the plaintiffs are claiming the suit property as part of their late mother's estate and that this issue was determined in Succession Case No. 138 of 1983 where Justice Mutuku held that there was no evidence supporting the claim that the suit property belonged to the late mother of the plaintiffs and not the late Kungu Karumba. It was submitted that the issues raised in this suit are the same ones being raised in the instant suit.
  9. The plaintiffs submitted that the court has jurisdiction to hear the matter; that what is in contention is an issue of possession and occupation of land and that it is the plaintiffs who have been in occupation of the suit property and have made investments thereon. It is the plaintiffs contention that the defendant interrupted their quiet possession of the suit property.
  10. The plaintiffs submitted that they were issued with a grant in Succession Cause No. 2860 of 2012 and that the grant has never been revoked and entitles them as grantees to the suit property.
  11. According to the plaintiffs, it is within their rights to file this suit; that this is not a family matter; that they have the right to sue the administrators of the Estate but did not do so as it is not the administrators



but the defendant who illegally evicted them from the suit property and that they have the locus standi to sue the defendant.

12. On the defendant's claim that the suit is res judicata, the plaintiffs submitted that the pleadings, prayers and judgement in the previous suit has had not been adduced as required by the law. The plaintiffs averred that they have never sued the defendant for the reliefs sought in their Plaint. It was submitted that the res judicata claim is therefore misplaced.

### **Analysis and Determination**

13. The definition of a preliminary objection was set out as follows in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969]EA 696:

“A Preliminary Objection 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 point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. The first point of law argued by the defendant is that the Environment and Land Court has no jurisdiction in this matter as it is a succession matter. This has been refuted by the plaintiffs who have argued that the court has jurisdiction because they have been in occupation of the suit property and that the defendant is seeking to evict them.
15. Having read the plaintiffs' Plaint and the Notice of Motion dated June 2021, I am convinced that the plaintiffs' suit falls within the jurisdiction of the Environment and Land Court and specifically as set out in section 13 (2)(e) of the *Environment and Land Court Act*.
16. I say so because what is before this court is a dispute relating to land whereby the plaintiffs are claiming that they are the owners and have been in occupation of the suit property and that the defendant has trespassed on the same and wants to evict them. That being so, and considering that whether the plaintiffs' occupation of the suit property is legal or not can only be considered after trial, this court has the requisite jurisdiction.
17. The second issue of law raised by the defendant is that the plaintiffs have no locus standi to bring the instant suit as they are not the personal representatives of the Estate of the Late Kungu Karumba. According to the defendant, it entered in a lease agreement with the rightful Administrators of the Estate.
18. The plaintiffs' case, as I understand it, is that they are in occupation of the suit land having by virtue of the decision in Nairobi High Court Succession Cause No. 138 of 1983, and in Succession Cause No. 2860 of 2012 and that as per the confirmed grant, they are entitled to the suit property.
19. The plaintiffs have therefore filed the suit in their capacities as the beneficiaries of the suit land and not in any other capacity. Both parties have conflicting perspectives on grants that authorize them to transact in the suit property. Consequently, it cannot be said that there is an assumption that the facts as pleaded are correct.
20. The validity of the grants in question cannot be dealt with by way of a Preliminary Objection. That is an issue that can only be determined either on affidavit evidence or at trial.
21. The third point of law raised by the defendant was that the suit as filed by the plaintiffs is res judicata as the matters raised were determined in Nairobi High Court Succession Cause No. 138 of 1983. The



law on determining whether a case is res judicata was set out as follows in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR:

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

- a. The suit or issue was directly and substantially in issue in the former suit.
- (b) That 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.”

22. I am not satisfied that the defendant’s claim of res judicata meets the above pre-conditions. Firstly, the parties in both suits are different. The defendant is not a party to the succession suit and it has not been demonstrated that it is claiming under any of the parties therein.
23. Secondly, the reliefs sought and consequently the issues raised in the two suits are different. In the succession matter, the plaintiffs were seeking temporary injunctions against the defendants therein, one of whom is an interested party in the current suit. In the present suit, the plaintiffs are seeking a permanent injunction and eviction orders against the defendant.
24. The law as it stands is that all the pre-conditions set out in section 7 of the *Civil Procedure Act* must be fulfilled for a claim of res judicata to be successful, which is not the position herein. In the circumstances, I find that the defendant’s claim fails.
25. For the reasons I have given above, I dismiss the defendant’s Preliminary Objection dated August 27, 2021 with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Abdulahi holding brief for Nurah for Defendant

Mr. Ngari for Plaintiff

Mr. Mukira h/b for Kabaiku for Interested Party

Ms Musyoka for Trustee

Court Assistant - June

