



Wainaina & 9 others v Wainaina & 2 others (Environment and Land Appeal E042 of 2021) [2023] KEELC 19902 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E042 OF 2021
CA OCHIENG, J
SEPTEMBER 18, 2023**

BETWEEN

BENARD KIMANI WAINAINA & 9 OTHERS APPELLANT

AND

JACINTA NJERI WAINAINA 1ST RESPONDENT

JAMES NJOROGE WAINAINA 2ND RESPONDENT

**MUKA MUKUU FARMERS COOPERATIVE SOCIETY LTD 3RD
RESPONDENT**

(Being an Appeal from the Ruling of the Honourable Mrs. M. Opanga Senior Resident Magistrate at Kangundo Law Courts dated 7th September, 2021 in ELC Case No. 47 of 2020)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the September 28, 2021 and filed on September 30, 2021, the Appellants appealed against the Ruling of the Senior Resident Magistrate Hon Martha Opanga made on the September 7, 2021 in Kangundo ELC Case No 47 of 2020 between Bernard Kimani Wainaina & 9 others Vs Jacinta Njeri Wainaina & 2 Others. The genesis of this Appeal is the Ruling by Hon Martha Opanga, Senior Resident Magistrate where she dismissed the Appellants' suit as being res judicata by virtue of the Cooperative Tribunal decision.
2. The Appellants being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated the September 28, 2021 which contains the following grounds:
 1. The Learned Magistrate erred in law and fact in holding that the suit between the Plaintiffs and the Defendants was res judicata null and void.



2. The Learned Magistrate erred in law and fact in holding that the issues in contention between the parties had been determined in the Cooperative Tribunal whereas there was glaring evidence to the contrary.

It is proposed to ask the honourable court for orders that:-

- i. That the Ruling of the Honourable Magistrate dated September 7, 2021 be set aside and be substituted with an order that Kangundo PMCC ELC Case No 47 of 2020 do proceed to full hearing on merit.
 - ii. That the costs of this Appeal be paid by the Respondents.
 - iii. Any other relief this Honourable Court may deem fit and just to grant in the circumstances of the Appeal.
3. The Appeal was canvassed by way of written submissions.

Submissions

Appellants' Submissions

4. The Appellants in their submissions provided a background of this matter and insisted that the lower court matter was not res judicata. They argue that the issue before the Cooperative Tribunal was whether the transfer from the deceased to his two wives was lawful or proper while in the lower court, they sought to have the whole process of transfer that followed their father's death to be declared unlawful as it excluded the children who were true beneficiaries. Further, that the parties in the two suits were different and the issues heard as well as determined by the Tribunal were totally different from what was substantially in issue in the lower court suit. They aver that the Tribunal only heard jurisdiction to determine disputes on how the shares of a deceased member of a Cooperative Society should be dealt with and not how land should be transmitted to the beneficiaries. Further, that Plot Number 3-034 is not a share in the 3rd Respondent but land that was actually allocated to the deceased. They reiterate that the suit in the Lower Court intends to address an injustice as the Appellants and 2nd Respondent reside on the suit land. Further, that the purported co-ownership means the Appellants who are ten (10) and their mother are entitled to one half of the land while the 2nd Respondent alone, the other half and this would prejudice them. To buttress their averments, they relied on the following decision: *Kenya Commercial Bank Ltd Vs Benjob Amalgamated Ltd* (2017) eKLR.
5. The 2nd Respondent in his submissions contends that the lower court suit was res judicata as the Cooperative Tribunal in Case No 172 of 2005 conclusively determined the ownership dispute relating to the share and Plot No 3-034 Muka Mukuu Cooperative Society Ltd. Further, that no Appeal was preferred against the Judgment of the Tribunal and the same stood final. He argues that the Appellants are asking Court to overturn the decision of the Tribunal but this is unprocedural since they ought to have filed an Appeal at the High Court. He insists that when the Appellants mother filed proceedings at the Cooperative Tribunal, she selfishly sought to have the entire share and portion of land transferred into her sole name but the said Tribunal after hearing the matter, declined her claim and upheld the decision of the Society (3rd Respondent) to register the two widows as co-owners of the Share as well as interests therefrom in equal shares. Further, the fact that her children (Appellants) did not seek to be enjoined in that suit does not give them the right to bring more or less similar proceedings. He reiterates that this court lacks jurisdiction to handle this matter by virtue of Section 76 of the *Cooperative Societies Act*. To support his arguments, he relied on the following decisions: *Charity Njanja Mwaniki (Suing on her behalf and 8 other siblings) V James Mwaniki Gaturu & Another* (2017) eKLR; *ET Vs*



Attorney General & Another (2012) eKLR and Roseline Alivitsa Asena & 5 Others V Kenya Railways Corporation & 2 Others (2019) eKLR.

6. The 3rd Respondent in its submissions contends that the facts of the lower court case and the dispute in the Cooperative Tribunal are similar. Further, that the subject matter is the same as it involves one family. It explains that the dispute over transfer of plot number 3-034 to the joint names of the two widows which is the basis of the Appellants' suit was the subject in aforementioned Tribunal proceedings. The 3rd Respondent insists the lower court case is hence res judicata and that the Appellant should instead have appealed the lower court Ruling. To support its averments, it relied on the following decisions: Kenya Commercial Bank Limited V Benjob Amalgamated Limited (2017) eKLR; Peter Mbogo Njogu V Joyce Wambui Njogu & Another (2005) eKLR; Accredo AG & 3 Others V Steffano Uccelli & Another (2019) eKLR and Suleiman Said Shabbal V Independent Electoral & Boundaries Commission & 3 Others (2014) eKLR.

Analysis and Determination

7. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination: Whether the Lower Court case is res judicata. Whether the Appeal is merited.
8. Before I proceed to make a determination of the issues herein, I wish to provide the background of the lower court case which has culminated in this Appeal. The Appellants are the adult children of the late Wainaina Mugecha who was member No 551 and owner of share No 555 an allottee of Plot No 3-034 measuring ten (10) acres. After the deceased demise, his shares were registered in the names of the two widows Jacinta N Wainaina and Jane Wambui Wainaina by Muka Mukuu Cooperative Society. Jacinta N Wainaina who is the 1st Respondent herein and the mother to the Appellants filed a complaint with the Cooperative Tribunal vide CTC Tribunal Case No 172 of 2005 against Muka Mukuu Farmers Cooperative Society Ltd which is the 3rd Respondent herein, and after deliberations, the Tribunal upheld the decision of the 3rd Respondent. The adult children of the 1st Respondent later filed a suit in the Machakos ELC that was transferred to Kangundo PMs Court which was dismissed for being res judicata and this forms the fulcrum of the Appeal herein.
9. The Appellants contend that the lower court suit is not res judicata as they were not parties to the Cooperative Tribunal proceedings. The 2nd and 3rd Respondents on the other hand insist that the learned Magistrate was right in her decision that the lower court suit was res judicata by virtue of the decision from the said Cooperative Tribunal.
10. From the Complaint, the Plaintiffs (Appellants) sought for the following orders:
 - a. A declaration that the transfer of plot numbers 3 -034 at Muka Mukuu Farmers Cooperative Society LTD was unlawful.
 - b. That the transfer be annulled/cancelled and the third Defendant be ordered to rectify the register and revert the property to the names of Wainaina Mugecha.
 - c. That the property be subjected to the due process.
11. I wish to reproduce an excerpt from the impugned decision of the Cooperative Tribunal:

“From the testimony by the officer from the society, they were of the view that the two widows ‘appeared to the committee of the society to be the personal representative of the deceased member.’ They sat down and shared the land between the widows equally. ...The management committee is mandated under Section 39(1) of the Cooperative Societies Act



to devolve and transfer the share and interest of the deceased member. They did this by sharing share No. 3-034 to the two widows. In turn the widows have signed on the certificate indicating their next of kin. The claimant did not dispute her thumbprint on the documents produced.”

12. On res judicata, Section 7 of the [Civil Procedure Act](#), stipulates that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

13. In the case of [Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another](#) (2017) eKLR in which it referred to [Uhuru Highway Development Ltd V Central Bank & Others](#), CA No 36 of 1996 where the Court of Appeal stated that:

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

14. Further in the case [Nancy Mwangi t/a Worthlin Marketers V Airtel Networks \(K\) Ltd \(Formerly Celtel Kenya Ltd\) & 2 Others](#) (2014) eKLR, J Gikonyo stated thus:

“The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others (2001) EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata...”

15. In relying on the legal provisions, I have cited above as well as associating myself with the decisions quoted while applying them to the circumstances at hand, I find that the ownership dispute relating to the share and Plot No 3-034 Muka Mukuu Cooperative Society Ltd in the name of the deceased was conclusively determined by the Cooperative Tribunal in case No 172 of 2005. Further, the 3rd Respondent as per the provisions of Section 39(1) of the [Cooperative Societies Act](#) which provides that:

- "(1) On the death of a member, a co-operative society may transfer the share or interest of the deceased member to—
- (a) the person nominated in accordance with this Act and any rules made thereunder; or



- (b) if there is no person so nominated, such person as may appear to the Committee of the society to be the personal representative of the deceased member; or
- (c) if either of such persons is not qualified under this Act and any rules made thereunder or the by-laws of such society for membership, such person, specified by the nominee or personal representative, as the case may be, who is so qualified, or may pay to such nominee or personal representative, as the case may be, a sum representing the value of such member's share or interest ascertained in accordance with any rules made under this Act or by-laws of the society.”

16. proceeded to register the shares in the name of the two widows. I note the 1st Respondent never proceeded to appeal against the Cooperative Tribunal's decision, hence it remains valid. I note the Appellants who are children of the 1st Respondent proceeded to clothe the dispute herein in fresh apparels but if the same is dissected, the fulcrum of the dispute is still substantially the same issue as in lower court suit, which is subject of this Appeal. It is worth noting that the Appellants only claim they were not party to the Tribunal proceedings but do not controvert the fact that the 3rd Respondent had the legal right to register the shares in the two widows names and that the Tribunal by dint of Section 76 of the *Cooperative Societies Act* had the jurisdiction to handle the dispute between the 1st Respondent and 3rd Respondent respectively.
17. In the circumstances, I find that the Appellants' claim was indeed res judicata and by invoking the provisions of the *Law of Succession Act*, they are merely seeking to relitigate the dispute herein. Further, that the issue of the suit land was already heard and determined by the Tribunal.
18. I opine that the Appellants cannot purport to bring forth another suit on the issues that were previously raised by their mother who is the 1st Respondent herein and direct their wrath upon the 3rd Respondent. It is my observation that Litigation must come to an end.
19. I hence find that the Learned Magistrate hence did not err in law and fact in holding that the suit between the Plaintiffs and the Defendants was res judicata. I further find that the Learned Magistrate did not err in law and fact in holding that the issues in contention between the parties had been determined in the Cooperative Tribunal. To my mind the Appellants claim in the lower court was merely a cosmetic facelift to give the suit a different look.
20. It is in that regard that I find the Appeal unmerited and will proceed to dismiss it. I direct the Appellants to pay the costs of the Appeal to the 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2023

CHRISTINE OCHIENG

JUDGE

