



REPUBLIC OF KENYA



**Munyi v Wanjau & another (Environment and Land Appeal E027 of 2022)
[2023] KEELC 20619 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E027 OF 2022
JM MUTUNGI, J
OCTOBER 12, 2023**

BETWEEN

FRANCIS GICHIMU MUNYI APPELLANT

AND

JACINTA WAMBUI WANJAU 1ST RESPONDENT

FLORENCE WAIRIKO GITHUMBI 2ND RESPONDENT

(Being an Appeal from the Ruling/Order of the Hon. P. M. Mugure) Principal Magistrate's Court at Wang'uru delivered on 24th October 2022 in Wang'uru ELC Case No. E057 of 2021)

JUDGMENT

1. The instant Appeal is against the Ruling delivered by P. M. Mugure, P.M in Wang'uru P.M. ELC No. 057 of 2021 on 24th October, 2022 dismissing the Appellant's Notice of Motion application dated 19th April 2022. By the application, the Appellant who was the Defendant before the Lower Court sought orders as follows:-
 - a. That the suit discloses no reasonable cause of action and the claim is sham and it is otherwise scandalous, frivolous or vexatious and it may prejudice, embarrass or delay the fair trial of action.
 - b. That the claim is otherwise an abuse of process of the Court.
 - c. That the claim is time barred by virtue of the provision of Section 7 of Limitation of Action Act Cap 22.
 - d. That the claim offend the provision of trust land (irrigation areas) Rules (Cap 288) respecting nominee (successor to holding No. 1957 accordingly.



2. The Learned Trial Magistrate upon considering the application held that the suit was not resjudicata and that the same raised issues of fraud which could only be adjudicated following a full hearing and not at the interlocutory stage. The Learned Trial Magistrate, placing reliance on the Case of *D.T Dobie & Co Ltd –vs- Muchina & Another* (1980) eKLR was of the view that the suit raised triable issues and proceeded to dismiss the application with costs to the Respondent.
3. Aggrieved and dissatisfied with the Ruling the Appellant has appealed against the Ruling and has set out the following grounds of Appeal:-
 1. That the Learned Magistrate in arriving at her decision mis-directed herself in law and fact and applied wrong legal principal in her consideration of an authorities for summary disposal of the case wherein the facts of the case truly confirmed the Plaintiffs abuse of the Court process.
 2. That the Learned Magistrate erred in law and fact in failing to consider the application dated 19/4/2022 upon the merit of the fact as expressly elaborated by the pleadings.
 3. That the Learned Magistrate erred in law and fact when she wrongly exercised her discretion in favours of the Respondents whereas the matter was res-judicata by dint of prior succession No. 14 of 1977 respecting the license No. 1957.
 4. That the Learned Magistrate in arriving at her decision did not act in a Judicious manner.
4. The Appellant prayed that the Appeal be allowed and the Ruling by the Learned Trial Magistrate be set aside and/or reversed and the costs of the Appeal be awarded to the Appellant.
5. As is the norm this being an Appellate Court of first instance, is required and indeed obligated to reconsider and re-evaluate the evidence before the Lower Court to determine whether or not the decision reached by the Lower Court was justified. The Court is not bound to accept the findings of fact arrived at by the Lower Court and is free to reach its own conclusions and findings after evaluating the evidence that was presented before the Lower Court. See the Case of *Selle & Another –vs- East Africa Motor Boat Ltd & Others* (1968)EA 123.
6. In my view the application before the Learned Trial Magistrate was dependent on whether or not the Learned Trial Magistrate considered there was a triable issue raised in the suit that necessitated determination at the trial and/or whether the suit was resjudicata and/or time barred as contended by the Appellant. In the suit before the Lower Court, the Respondents claimed that the Appellant was fraudulently appointed as the licensee of Rice Holding 1957 that the 1st Respondent claimed belonged to her father Munyi Gichimu (deceased). The Appellants under paragraph 4 of the Plaint gave the particulars of the alleged fraud on the part of the Respondent. The Respondent in his defence denied the particulars of fraud and further averred the Appellants claim was time barred and that the Court lacked the requisite jurisdiction to deal with the matter. The Respondent further averred the Appellants lacked the locus standi to institute the suit as they were never nominated as successors of Rice holding No. 1957 by anyone.
7. In the application before the Subordinate Court the Appellant had in support of the application sworn an Affidavit in support to which he annexed a bundle of documents including succession proceedings in Wang’uru District Magistrate’s Court Succession Cause No. 14 of 1977 marked as FGM III. In the proceedings of 5/5/77 it is clear the subject matter was Rice Holding No. 1957 Mwea Irrigation Settlement Scheme. Among the parties present was the 2nd Respondent. An order was made that the Appellant Munyi Gichimu (then a minor) do succeed Rice Holding 1957. A guardian was appointed to hold the Rice Holding on the minor’s behalf. Following the death of the guardian and the Appellant having attained the age of majority the Court on 12/5/2000 revoked



the guardianship and the Appellant was accorded full rights to manage Rice Holding 1957 Mwea Scheme. The Appellant consequent to the succession proceedings and revocation of the guardianship was registered as the beneficiary of Rice Holding 1957 Mwea/Irrigation Scheme and issued with a tenant card on 12/5/2000.

8. The Respondents it is evident from the succession proceedings were aware that the Appellant had been nominated to succeed Rice Holding No. 1957 Mwea Irrigation Scheme. The Respondents did not object and/or appeal against the order made by the Succession Court at Wang'uru. The Appellant has contended that issues relating to the succession of Rice Holding No. 1957 are res judicata by reason of Wang'uru succession Cause No. 14 of 1977 where the issue was finally determined. As I have observed, the Respondents were aware of the proceedings at the Wang'uru Court and they never raised any objection and/or appealed the order.
9. The Respondents suit before the Wang'uru PM's Court was filed on 13th July 2013 over 20 years after the Appellant was registered as the allottee of Rice Holding No. 1957. The Appellant contended that the suit by the Respondents was statute barred by virtue of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The Respondents have not explained their inaction from 1977 up to 2021 when they initiated the action.
10. On appraisal and evaluation of the Appellants application before the Lower Court and having regard to the material and evidence placed before the Court, I come to the irresistible conclusion that the Respondents suit before the Lower Court is not only resjudicata on account of the Wanguru succession cause No. 14 of 1977 but is also statute barred.
11. I am of the view that the Respondents merely alleged fraud at the time of the institution in an attempt to get the Court to admit the claim so as to get a second bite of the cherry and/or otherwise revive a matter that had long been determined. If the Respondents had any issue to raise, the appropriate time was when the succession proceedings were being undertaken. It cannot be prudent to sleep on your rights for two decades and all of a sudden awaken and seek to take the clock over two decades back. Litigants have to be diligent and ensure they agitate their rights at the earliest possible moment when at least the evidence is fresh and witnesses are available.
12. From my observations, the fate of this Appeal is evident. The Learned Trial Magistrate in my view failed to properly appraise the application and the material placed before her in support of the same. If the Learned Magistrate had considered the import of the Wang'uru succession Cause, she most probably would not have come to the same conclusion. She gave too much premium to the Respondents allegations of fraud which she held were not raised in the succession cause. The point is the Respondents were aware of the succession cause and never raised any issue. Even assuming there was a cause of action founded on fraud, when did the fraud occur and/or when did the Respondents become aware of it? On the basis of the documents exhibited by the Respondents and filed simultaneously with the Plaint there is no doubt the Respondents were all along aware of the succession proceedings. If fraud occurred during the succession proceedings, and/or in 2000, when the Appellant was given the tenancy of the Rice Holding, then clearly any claim founded on such fraud would be time barred as such claim would need to have been instituted within three years from the date of the accrual of the cause of action.
13. The upshot is that I find merit in the Appeal and I allow the same. The result is that Ruling of the Learned Magistrate is set aside and in place thereof an order striking out the suit is hereby substituted. The Appellant will have the costs of the Appeal and of the suit before the subordinate Court.
Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 12TH DAY OF
OCTOBER 2023.**

J. M. MUTUNGI

ELC JUDGE

