



**Thumbi & 3 others v Thumbi & another (Environment & Land Case  
E054 of 2021) [2022] KEELC 3404 (KLR) (3 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3404 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E054 OF 2021**

**BM EBOSO, J**

**JUNE 3, 2022**

**BETWEEN**

**GRACE NDUATA THUMBI (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF VERONICA GATHONI THUMBI) ..... 1<sup>ST</sup> PLAINTIFF**

**SUSAN NDUATA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF LUCY WAMBUI THUMBI) ..... 2<sup>ND</sup> PLAINTIFF**

**LILIAN WAIRIMU THUMBI ..... 3<sup>RD</sup> PLAINTIFF**

**ALICE WANGUI THUMBI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**STANLEY GITHIRI THUMBI ..... 1<sup>ST</sup> DEFENDANT**

**PETER KAMAU THUMBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs initiated this suit through a plaint dated May 13, 2021. Their case is that they are beneficiaries of the estate of Thumbi Itati (the deceased) who died intestate in 1997. The deceased owned land parcel numbers Muguga/Muguga/325; Muguga/Muguga/T 201; and Nyandarua/Gathanji/ Gatimu Block 1/58. They contend that the defendants have, without the requisite grant and/or certificate of confirmation of grant, caused parcel numbers Muguga/Muguga/325 to be subdivided into Muguga/ Mugugua/3984 and 3985 and registered in their names. They further contend that the defendants have, without the requisite certificate of confirmation under the [Law of Succession Act](#), caused Muguga/ Muguga/ T 201 to be subdivided into Muguga/ Muguga/7677 and 7678 and registered in their names. They add that the defendants are in the process of illegally receiving compensation money from the National Land Commission in relation to part of the deceased's land that was compulsorily acquired for the implementation of the James Gichuru – Rironi Junction Road



Project. Lastly, they contend that the defendants have, without consultation, exhumed bodies of their four relatives who had been interred on the land subject matter of compulsory acquisition.

2. They seek the following reliefs:
  - a. A finding that Muguga/Muguga/T 201, Muguga/Muguga/325 and Nyandarua/Gathanji/Gatimu Block 1/158 formed a part of the estate of Thumbi Itati and was subject to distribution amongst his beneficiaries.
  - b. A declaration that the transfer of Muguga/Muguga/T 201, Muguga/Muguga/325 and Nyandarua/Gathanji/Gatimu Block 1/158 to Stanley Githiri Thumbi the 1st defendant herein was fraudulent and illegal and of no legal effect.
  - c. A declaration that the subdivision of Muguga/Muguga/325 and issue of titles known as Muguga/Muguga/3984 and Muguga/ Muguga/ 3985 in the names of Stanley Githiri Thumbi and Peter Kamau Thumbi was fraudulent, illegal and of no legal effect.
  - d. An order for the cancellation of the transfer of the properties known as Muguga/Muguga/T 201, Muguga/Muguga/325 and Nyandarua/Gathanji/Gatimu Block 1/158 to Stanley Githiri Thumbi.
  - e. An order for cancellation of the subdivision and issue of titles Muguga/ Muguga/ 3984 and Muguga/ Muguga/ 3985 to Stanley Githiri Thumbi and Peter Kamau Thumbi.
  - f. A finding that the compensation due from the National Land Commission for the James Gichuru Junction-Rironi Junction (A104/B3) in respect of Muguga/Muguga/325 is not payable to the defendants.
  - g. A declaration that the subdivision of Muguga/Muguga/T 201 and issue of titles known as Muguga/Muguga/7677 and Muguga/ Muguga/7678 in the names of Stanley Githiri Thumbi and Peter Kamau Thumbi was fraudulent, illegal and of no legal effect.
  - h. An order for cancellation of the subdivision and issue of titles Muguga/Muguga/7677 and Muguga/Muguga/7678 to Stanley Githiri Thumbi and Peter Kamau Thumbi.
  - i. A finding that the exhumation of Veronicah Gathoni Thumbi, Lucy Wambui Thumbi and Grace Nduta Thumbi done on March 6, 2021 was illegal and unprocedural.
  - j. An order that the defendants bear the costs of preservation and re-interment of Veronicah Gathoni Thumbi and Lucy Wambui Thumbi.
  - k. An order that the defendants bear the costs of the suit and those of the reversion of the suit property to the estate.
  - l. Any other order this honorable court may grant.
3. The defendants filed a joint statement of defence dated June 9, 2021 in which they aver that at the point of his death, Thumbi Itati had no assets as they had “all been given out *inter vivos* and/or willed out”. They contend that the interment that was done on parcel number Muguga/Muguga/325 was effected with the consent of the 1st defendant who was the sole registered proprietor of the land. It is their case that exhumation of the bodies was done to avoid having a road constructed on top of the graves. They urge the court to dismiss the suit.
4. Together with the plaint, the plaintiff’s brought a notice of motion dated May 13, 2021 seeking an order restraining the defendants against claiming compensation from the National Land Commission



in respect of Muguga/Muguga/3984 and 3985 [originally Muguga/Muguga/325] pending the hearing and determination of this suit. The said notice of motion is one of the two applications that fall for determination in this ruling.

5. The second application falling for determination in this ruling is the defendants' notice of motion dated November 25, 2021 in which the defendants seek an order striking out this suit on the grounds that: (i) the plaintiffs previously filed Thika ELC Case No 43 of 2020; (ii) the 3rd plaintiff filed an application for revocation or annulment of the grant in Nairobi High Court Succession Cause No 2857 of 2015 in which she sought similar reliefs; and (iii) the court was being invited to determine a succession dispute. Given that the application dated November 25, 2021 challenges the jurisdiction of this court to entertain this suit, I will dispose it first.

#### **Application dated November 25, 2021**

6. The defendants' application is supported by an affidavit sworn on November 25, 2021 by Stanley Githiri Thumbi. The application was canvassed through written submissions dated January 28, 2022, filed by the firm of J M Njoroge & Company Advocates. The said submissions covered the two applications. In so far as the application dated November 25, 2021 is concerned, the defendants contend that the plaintiffs have sought a finding that the suit properties form part of the estate of Thumbi Itati and the estate is subject to distribution amongst the beneficiaries. They contend that this is a succession dispute which should be adjudicated by the High Court and not the Environment and Land Court.
7. The defendants further contend that this suit is scandalous, frivolous, vexatious and an abuse of the process of the court in that the issues raised in the suit were raised in Nairobi High Court Succession Cause No 2857 of 2015. The defendants contend that this suit is *res judicata* for the same reason.
8. The plaintiffs' responded to the application dated November 25, 2021 through a replying affidavit sworn on December 7, 2021 by Susan Nduta. They filed written submissions dated December 7, 2021 through the firm of W J Ithondeka & Co Advocates. Their case is that the estate of Grace Nduta Thumbi and that of Thumbi Itati are distinct entities. They add that for distribution of properties or assets within an estate to be done, the ownership of the properties must first be determined. It is their case that they have moved this court for a determination in the first instance that the suit properties belong to the estate of Thumbi Itati and only subsequent to that finding can the properties be distributed amongst his beneficiaries.
9. The plaintiffs contend that there exists no proceedings relating to the estate of Thumbi Itati because the defendants fraudulently transferred the assets of the estate to themselves to the exclusion of all the other beneficiaries. They further contend that land parcel number Muguga/Muguga/325 is part of the Estate of Thumbi Itati and not that of Grace Nduta Thumbi. It is their case that the suit properties cannot be dealt with in the succession proceedings relating to the estate of Grace Nduta Thumbi. Lastly, they contend that Thika ELC Case No 43 of 2020 was withdrawn before determination on the ground that the plaintiff did not have capacity to initiate the suit.
10. I have considered the application dated November 25, 2021, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common set of issues to be determined in the application. Having considered the grounds set out in the application, the respective affidavits, and the parties' respective submissions, the following are the two issues that fall for determination in the application: (i) Whether at this point this court has jurisdiction to adjudicate the key issues in this suit; and (ii) Whether this suit is *res judicata*. I will make brief sequential pronouncements on the two issues in the above order.



11. The first issue is whether at this point this court has jurisdiction to adjudicate the key issues raised in this suit. There appears to be common ground that no succession proceedings have been initiated in respect of the estate of the late Thumbi Itati. There also appears to be common ground that, at some point, land parcel numbers Muguga/Muguga/325, Muguga/ Muguga/ T 201 and Nyandarua/ Gathanji Gatimu Block 1/58 all belonged to the late Thumbi Itati. The plaintiffs contend that the three parcels of land still belonged to the late Thumbi Itati at the time of his death. The defendants contest that and contend that at the time of his death, the late Thumbi Itati had already given out the properties “*inter vivos* and/or willed out the same.” At this point, I can only say that if indeed any of the assets had been “willed out”, one would have expected that probate proceedings would be initiated to give effect to the will. There is, however, no evidence of any form of succession proceedings relating to the estate of the late Thumbi Itati.
12. What emerges from my reading of the plaintiff’s pleadings is that they contend that they are direct and indirect beneficiaries of the estate of the late Thumbi Itati. They allege that the two defendants have connived to disinherit them by transferring Thumbi Itati’s properties into their individual names without taking out succession proceedings relating to the estate of Thumbi Itati. It is their case that the compensation money held by the National Land Commission in relation to the land which was acquired compulsorily for the road project belongs to the estate of Thumbi Itati.
13. One of the key issues which this court has been invited to adjudicate is the question as to whether the three parcels of land belong to the estate of the late Thumbi Itati. Can that question be answered in the absence of duly appointed personal representatives of the late Thumbi Itati? My answer to the above question is in the negative. The [\*Law of Succession Act\*](#) contains an elaborate framework on how the estate of a deceased person is to be administered. It also contains an elaborate framework on how personal representatives of the deceased are appointed and their powers and duties. Indeed, when those who enjoy priority decline to initiate succession proceedings, the law provides a framework which enables lesser ranked beneficiaries to initiate succession proceeding and obtain grants.
14. The glaring omission in this dispute, which regrettably divests jurisdiction from this court, is the plaintiffs’ and the defendants’ failure to first initiate succession proceedings, at least up to the level of appointment of personal representatives to administer the estate of the late Thumbi Itati. The duly appointed personal representatives are the ones to either sue or be sued alongside the defendants in relation to the allegations made by the plaintiffs. Until the question of administration of the estate of the late Thumbi Itati is settled by the court contemplated under the [\*Law of Succession Act\*](#), this court would not have jurisdiction to adjudicate the key issues in this dispute. Put differently, the plaintiffs, as alleged beneficiaries, have invited this court to exercise jurisdiction prematurely. They should first pursue the appointment of personal representatives to administer the estate of Thumbi Itati.
15. For the above reasons, I agree with the defendants that at this point this court has no jurisdiction to entertain a land dispute relating to an estate that does not have personal representatives within the meaning of the [\*Law of Succession Act\*](#).
16. The second issue is whether this suit is *res judicata*. The defendants contended that because land parcel number Muguga/Muguga/325 featured in succession proceedings relating to the estate of Grace Nduta Thumbi, this suit is *res judicata*. I do not think the mere fact that the above parcel of land featured in some other succession proceedings would be a proper basis for striking out the suit in limine. The proper approach would be to let the issue be dealt with during trial so that all the facts, including the previous pronouncements of the court on the said parcel of land, are properly considered by the trial court.



17. The defendants similarly cited Thika ELC Case no 43 of 2020 as a basis for contending that this suit is *res judicata*. The plaintiffs' response was that the said suit was withdrawn when the plaintiff realized that she lacked capacity to initiate the suit. There was no evidence to suggest that there was any form of adjudication and determination of the issues in the said suit. In my view, in the absence of evidence of some form of conclusive adjudication and determination of the issues, the key elements of the doctrine of *res judicata* cannot be said to have been established. Consequently, my finding on the second issue is that the defendants have not established the key elements of *res judicata*.
18. The result is that I will strike out this suit on the ground that this court does not have jurisdiction to entertain the present dispute in the absence of duly appointed personal representatives of the late Thumbi Itati. The plaintiffs should first pursue administration of the estate of the late Thumbi Itati. Taking into account the defendants' defence to the effect that the suit properties had already been "willed out" and the fact that they did not exhibit any probate proceedings relating to the alleged will, parties will bear their respective costs of the suit.
19. Having come to the finding that the plaintiffs' suit is incompetent and stands to be struck out, the application dated May 13, 2021 will suffer the same fate.

### **Disposal Orders**

20. In the end, the plaintiffs' application dated May 13, 2021 and the defendants' application dated November 25, 2021 are disposed as follows:
  - a. The suit herein is struck out for having been initiated by the plaintiffs without first pursuing administration of the estate of Thumbi Itati within the framework of the [Law of Succession Act](#).
  - b. Parties shall bear their respective costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF JUNE 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

**Ms Waweru for the Plaintiffs**

**Mr Njoroge for the Defendants**

**Court Assistant: Ms Lucy Muthoni**

