



Soita (Suing as a representative of the Estate of Peter Soita Shitanda-Deceased) v Malumasi & 2 others (Environment & Land Case E004 of 2022) [2022] KEELC 13265 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 13265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E004 OF 2022**

**BN OLAO, J
JULY 7, 2022**

BETWEEN

**BETTY GLORIOUS SOITA PLAINTIFF
SUING AS A REPRESENTATIVE OF THE ESTATE OF PETER SOITA
SHITANDA- DECEASED**

AND

**GEORGE MALUMASI 1ST DEFENDANT
AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT
KABRAS FARM LIMITED 3RD DEFENDANT**

RULING

1. By her plaint dated and filed herein on February 17, 2022, Betty Golorious Soita (the applicant) suing as the representative of the estate of Peter Soita Shitanda (the deceased) filed this suit against George Malumasi, Agricultural Finance Corporation and Kabras Farm Ltd (the 1st, 2nd and 3rd respondents respectively) seeking judgement against them jointly and severally in the following terms: -
 - a. Declaration that the applicant is the lawful owner of the suit land.
 - b. Declaration that the actions of the 1st respondent was *ultra vires* and in breach of the rules of natural justice and therefore void ab initio.
 - c. A permanent injunction do issue restraining the 1st respondent by himself, his servants agents, employees, proxies successors and/or any other person howsoever from trespassing, encroaching onto, remaining on and or in any other way whatsoever interfering with all that parcel of land known as parcel No Bungoma/Kabuyefwe/271 situated in Bungoma county.



- d. Damages.
 - e. Costs of this suit.
 - f. Any other relief that this honourable court deems fit to grant.
2. The basis of the suit is that at all material time, the applicant was the lawful owner and in possession of the land parcel No Bungoma/ Kabuyefwe/271 (the suit property) which had been purchased by the deceased in a public auction conducted by the 2nd respondent in 2008. That the deceased bid for the suit property through the 3rd respondent which he had incorporated as a co – director together with the 1st respondent but for which he (deceased) made payments directly to the 2nd respondent. However, the 1st respondent has forcefully entered the suit property which forms part of the deceased’s estate and for which his family has invested substantially hence this suit.
 3. Simultaneously with the plaint, the applicant filed a notice of motion also dated February 17, 2022 and premised under orders 40 and 50 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. By that notice of motion, later amended on February 18, 2022 and which is the subject of this ruling, the applicant seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That the court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants from trespassing on, wasting, alienating or otherwise interfering or dealing with the applicant’s property being title NoBungoma/ Kabuyefwe/271 pending the hearing and determination of this suit.
 - d. That the officer commanding (OCS) Mbakalo police station do enforce compliance of the orders above.
 - e. That costs be provided for.
 4. The application is predicated on the grounds set out therein and is also supported by the applicant’s affidavit dated February 17, 2022 as well as that of Terrence Shitanda dated February 16, 2022. The two affidavits are basically a replica of each other.
 5. The gist of the application is that the applicant has filed this suit as the legal representative of the estate of the deceased having obtained a grant of letters of administration *ad colligenda bona* defunct in Nairobi High Court P & A cause No 1520 of 2016 in respect of the deceased’s estate. That the deceased purchased the suit property, which previously belonged to Nerosim Farms Ltd, following a public auction conducted by the 2nd respondent in 2008 through a company known as Kabras Farm Ltd. That the deceased solely made all the payments to the 2nd respondents from his own funds. That the 1st respondent who was a co – director in Kabras Farm Ltd did not make any contributions towards the purchase of the suit property. That the said Kabras Farm Ltd neither opened any bank account nor made any returns under the Companies Act and regulations and neither did it transact any business. That the suit property was not transferred to Kabras Farm Ltd and the applicant and his family remained in possession thereof since it was the deceased’s wish that it be inherited by his children Terrence, Sidney and Charles.
 6. That the January 2020, the 1st respondent took advantage of the demise of the deceased and forcefully begun to plough the suit property before the police intervened to stop his illegal activities. The applicant also lodged an application in Nairobi High Court succession cause No 1520 of 2016 seeking



preservatory orders but the court declined citing lack of jurisdiction. The applicant reported to the police and the 1st respondent was arrested. That the applicant and her children have acquired possessory rights over the suit property.

7. Annexed to the said supporting affidavit are the following documents: -
 1. Limited grant of letters of administration ad litem issued to the applicant on February 10, 2020 in Nairobi High Court P & A cause No 1520 of 2016 in respect of the deceased's Estate.
 2. Title deed for land parcel No Bungoma/Kabuyefwe/271 issued on July 25, 1997 in the name of nirosim farms ltd.
 3. Certificate of incorporation No C 157617 issued on July 10, 2008 in the name of Kabras Farm Ltd.
 4. Ruling delivered on February 16, 2022 in Nairobi High Court P & A cause No 1520 of 2016 Betty Glorious Soita v George Malumasi.
8. The application is opposed by the 1st and 3rd respondents who have filed both a replying affidavit and grounds of preliminary objection.
9. In their grounds of preliminary objection, the 1st and 3rd respondents raise the following issues: -
 1. The application and the entire suit are res judicata and contrary to the provisions of section 7 of the *Civil Procedure Act* having been determined by the ruling of Mugure Thande J In Nairobi High Court succession cause No 1520 of 2016.
 2. This court lacks the jurisdiction to determine disputes relating to shares in a company.
 3. The applicant lacks the requisite *locus standi* to institute this suit which is an abuse of the court process.
 4. The suit is time barred having been brought outside the statutory limitation of 12 years.
10. In his replying affidavit dated March 2, 2022 and sworn by the 1st respondent on his own behalf and also with the authority of the 3rd respondent, the 1st respondent has averred, *inter alia*, that he is a director of Kabras Farm Ltd and that the applicant is one of the wives of the deceased who was also a director and shareholder of the said company. That the applicant has no locus standi to file this suit since the other wife of the deceased one Agnes K Nduku has filed an objection. Further, that the letters of administration *ad colligenda bona* defunct obtained by the applicant is only limited to collecting and preserving the deceased's estate. That the suit property belongs to Kabras Farm Ltd and is not part of the estate of the deceased. That the 1st respondent and the deceased each had 500 shares in the said company and the deceased's share have not been allocated to any beneficiary.
11. That Kabras Farm Ltd purchased the suit property in an auction and by the time the deceased passed on, no transfer of the same had been made in the name of the company. That each of the directors of the company contributed equally towards the purchase of the suit property and it is not true that the deceased made contributions on his own or that the suit property was family property.
12. That following the demise of the deceased, the applicant invaded the suit property, wasted it and has criminalized a civil suit by abusing police powers. The 1st respondent added further that the deceased died without a will and it is not true that the applicant and her children have any rights in the suit property. The issue of the ownership of the suit property has been determined by Mugure Thande J In Nairobi High Court succession cause No 1520 of 2016 and this court cannot now sit on appeal from a decision of a court of concurrent jurisdiction. That the applicant is a trespasser trying to hoodwink this



court having filed a similar application in the succession cause. That the applicant has wasted the suit property soon after obtaining the *ex – parte* injunction orders on February 22, 2022. This application is therefore frivolous, vexatious and an abuse of the court process and the applicant is not deserving of the orders sought.

[13] The following documents are annexed to the replying affidavit by the 1st respondent: -

1. Certificate of incorporation of Kabras Farm Ltd.
2. Memorandum and articles of association of Kabras Farm Ltd.
3. Documents in Kibukusu language without a certificate of translation.
4. Ruling in Nairobi High Court succession cause No 1520 of 2016 delivered on February 4, 2022 by Mugure Thande J.
5. Notice of motion filed in Nairobi High Court succession cause No 1520 of 2016.
6. Title deed for land parcel No Bungoma/Kabuyefwe/271 in the name of Nirosim Farms Ltd dated July 25, 1997.
7. Letter of consent.
8. Letter from B A A AChieng & Company Advocates dated November 21, 2019.
9. Applicant's affidavit dated February 27, 2020.
10. Order issued in Nairobi High Court succession cause No 1520 of 2016 on February 10, 2020.
11. Letter dated February 26, 2020 from Agricultural Finance Corporation addressed to B A A Achieng & Company Advocates.

[14] The applicant filed grounds of opposition to the preliminary objection describing it as incompetent and an abuse of the process of the court since it is not anchored on any law. She added further that: -

1. Article 162(2) of the Constitution establishes this court which deals with the environment and land.
2. That the ruling of Mugure Thande J in Nairobi High Court succession cause No 1520 of 2016 was only confirmed to section 45 of the Law Of Succession Act.
3. The applicant has obtained a limited grant to file this suit on behalf of the estate of the late Peter Soita Shitanda.
15. The cause of action arose well within the required time and does not offend section 7 of the Limitation of Actions Act.
16. The application has been canvassed by way of written submissions as directed. These have been filed both by Mr Chesoli instructed by the firm of Chesoli & Company Advocates for the applicant and by Mr Busiega instructed by the firm of Mayende & Busiega Advocates for the 1st and 3rd respondents.
17. The 2nd respondent did not file any response to the application.

I have considered the application, the rival affidavits, the notice of preliminary objection and responses thereto as well as the submissions by counsel.



18. The notice of preliminary objection raises issues of law and meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* 1969 EA 696 where Sir Charles Newbold P said at page 701 as follows:-

A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.” emphasis mine.

In the same case, Law J.A defined it as follows at page 701: -

So far as I am aware, 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.” emphasis mine.

The issues raised by the 1st and 3rd respondents in their notice of preliminary objection touch on *res – judicata*, this court’s jurisdiction, the applicant’s *locus standi* and limitation under cap 22 Laws of Kenya. They are therefore pure points of law. And since such an objection, if up – held, can dispose of this suit, it is important that it be the first port of call in this ruling. I shall therefore determine each one of them.

Res – Judicata: -

19. This is provided for in section 7 of the [Civil Procedure Act](#) in the following terms: -

7 “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.”

20. It is clear from the above that for *res – judicata* to apply, the following must be proved: -

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

See [Iebc v Maina Kiai & others](#) 2017 eKLR among others. The doctrine of *res – judicata* serves to bring litigation to an end so that parties are not vexed by suits or issues which have already been determined by other competent courts or tribunals. It also prevents forum shopping which this suit appears to me to be a classic example of.

21. It is common ground that the applicant and the 1st respondents were parties in Nairobi High Court succession cause No 1520 of 2016 where the applicant was also the applicant and the respondent was also the respondent. The other parties were not involved and the main issues placed before Mugure



Thande J was to grant an order of eviction against the 1st respondent, his agents, servants employees and/or assigns from the suit property. The judge was also asked to order that the officer commanding (OCS) Mbakalo police station provide security during that eviction. The orders sought therein are not too dissimilar to those sought therein and Mugure Thande J struck out the application with costs having found that as a succession court, she could not deal with the suit property since it was not part of the estate of the deceased and further, the applicant had no *locus standi* having moved to court without a grant of representation. The judge however made the following finding which is important for purposes of this ruling.

It is not disputed that the deceased was a director and shareholder of Kabras, the exhibited documents confirm as much. It is also not disputed that Kabras had purchased the suit property but that the transfer to Kabras is yet to be effected. Even if the transfer had been completed and the title was in the name of Kabras, the applicant would still encounter headwinds. This is because a company is a separate legal entity apart from its members. This principle is espoused in the famous case of *Salmon v Salmon & Co Ltd* 1897 AC 22. The suit property belongs to Kabras and not to any of the company's individual shareholders. The assertion by the applicant that the deceased bought the suit property through Kabras is clearly a misapprehension of the concept that a company is a separate legal entity distinct from its members. Accordingly, I find and hold that this court lacks jurisdiction to grant the orders sought in relation to the suit property as the same does not form part of the estate of the deceased." emphasis mine.

Mugure Thande J therefore made a clear and un – ambiguous finding that “that suit property belongs to Kabras and not to any of the company's individual shareholders.” The judge also flatly rejected the applicant's suggestion that the deceased had purchased it and dismissed it as a “misapprehension.” There is nothing to suggest that any appeal was filed against the ruling in which the judge struck out the applicant's application with costs to the respondent. Res – judicata applies both to suits as well as to applications. It is not therefore open to the applicant to now aver in these proceedings, as she has done in paragraph 15 of her plaint that: -

The plaintiff avers that the suit property belongs to the deceased person and as such should form part of the estate of the late Peter Soita Shitanda (deceased) and should be administered and distributed under the laws of succession.”

It is also not open to her counsel to submit, as he has done at page 3 of his submissions, that: -

My lord, the main dispute is whether or not the 1st respondent is an owner of the property by virtue of being a shareholder in the 3rd respondent. This is an issue that can only be ascertained at the trial”

The issue of the ownership of the suit property has already, in my view, been conclusively determined by Mugure Thande J. This court cannot purport to sit on appeal against that finding. In the circumstances, this court cannot even proceed to interrogate the merits or otherwise of the prayers sought by the applicant which include in paragraph 18(a) of the plaint: -

A declaration that the plaintiff is the lawful owner of the suit land.”

22. I have agonized whether by using the words; “accordingly, I find and hold that this court lacks jurisdiction to grant the orders sought” Mugure Thande J meant that she had no jurisdiction to determine the suit before her. I take the view that that is not what the judge meant. Rather, I am satisfied that the judge was properly seized of the succession dispute before her which involved the ownership



of the suit property and whether it formed part of the deceased's estate. However, she found that it did not form part of the said estate and made findings accordingly. Therefore, the reference to "this court lacks jurisdiction," in my view, could only have meant that having made the finding which she did, with regard to the ownership of the suit property, the judge was satisfied that the suit property was not part of the deceased's estate and she had no jurisdiction to treat it as such.

23. Secondly, if Mugure Thande J had no jurisdiction to determine the dispute before her, she would have promptly downed her tools in the matter and transferred it to another competent Court or made other appropriate orders – *Owners of The Motor Vessel "Lillian S" v Caltes Oil Kenya Ltd* 1989 KLR 1. Instead, the judge made an order striking out the application before her with costs. She could only have done so because she was seized of jurisdiction.
24. Clearly, therefore, the succession court presided over by Mugure Thande J was a competent court as is required by section 7 of the *Civil Procedure Act* and the issue of injuncting the respondent was heard and finally determined by that court between the same parties herein. It would have been a different case if the applicant had perhaps approached this court predicating her case on a claim that Kabras Farm Ltd holds the suit land in trust on behalf of her and her family. That would have been another issue because a succession court cannot determine a dispute based on trust. However, the claim to have her declared as the owner of the suit land is clearly *res – judicata*.
25. That objection has been properly invoked and I must up – hold it.

Jurisdiction: -

26. The objection that this court has no jurisdiction because this dispute involves shares in a company is unfounded. The applicant's claim is that the suit property belongs to the deceased, that she and her family have invested in it substantially and the 1st respondent has forcefully entered therein illegally. She therefore seeks the main order that she is the lawful owner thereof and the 1st respondent be restrained from trespassing, encroaching onto or remaining on any part thereof either by himself, his agents, servants, employees, proxies, successors or any other person. She also seeks general damages for that trespass. That is a matter for this court whose jurisdiction is set out in section 13(1) of the *Environment and Land Court Act*. There is nothing in the plaint to suggest that this dispute is about shares in the company known as Kabras Farm Ltd.
27. That objection is for dismissal.

Locus Standi of the Applicant: -

28. It has also been suggested that the applicant has no locus standi to file this suit because she only holds a grant of letters of administration *ad colligenda bona* defunct which is only limited for the collection and reservation of the estate of the deceased. I have looked at the grant issued to the applicant by A. Onger J on February 10, 2020. It is a limited grant *ad litem* and states that it is "..... limited only to the purpose of filing suit" The applicant clearly has the *locus standi* to file this suit on behalf of the deceased. In any event, although she has approached this court suing as the legal representative of the deceased's estate, it is clear from the remedies sought that in fact she seeks orders to be declared as the owner of the suit property.
29. That objection is not well taken. I dismiss it.
30. Finally, the 1st and 3rd respondents claim that this suit has been filed outside the statutory limitation period of 12 years contrary to the provision of section 7 of the *Limitation of Action Act*.



31. There is merit in that objection. The applicant claims the deceased purchased the suit property in 2008. Her claim to the said property is not through a direct purchase herself. Rather, it is that the deceased purchased it had intended it to be family property. The issue of ownership of the suit property has of course now been settled. The period between 2008 to 2022 when this suit was filed is 14 years. Section 7 of the [Limitation of Actions Act](#) states that: -

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The objection as to limitation is well taken because if, as she claims, it is her property, then it must have become her property in 2008. Her claim has been defeated by the law of limitation.

32. Having said so, however, it is clear that both the notice of motion and the suit are *res – judicata*. The issue of the ownership of the suit property was determined by Mugure Thande J *vide* her ruling dated February 4, 2022 against which no appeal was filed. To purport to re – visit that issue in these proceedings would amount to sitting on appeal against that ruling. This court must resist that temptation and strike out this application and the suit upon which it is founded.
33. Even if I am wrong on my finding on the issue of *res – judicata* and have to determine the notice of motion on its merits, I would have to consider it on the basis of the guidelines set out in the case of *Giella v Cassman Brown & Co Ltd* 1973 EA 358 which are that the applicant must establish a *prima facie* case with a probability of success. Secondly; an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages and thirdly, if in doubt, the court will decide the application on the balance of convenience.
34. In [Mrao Ltd v First American Bank of Kenya Ltd](#) 2003 KLR 125, a *prima facie* case was defined by Bosire J A in the following terms.

So what is a *prima facie* case? I would say that in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” emphasis mine

In the case of *Nguruman Ltd v Jan Bonde Nielsen & Others Ca Civil Appeal No 77 of 2012*, the Court of Appeal adopted that definition and went on to add the following: -

The party on whom the burden of proving *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.” Emphasis mine.

In view of the very clear findings by Mugure Thande J that “the suit property belongs to Kabras and not to any of the company’s individual shareholders,” it is difficult to see what *prima facie* case the applicant



has established. Clearly, she has no right in the suit property which is threatened with violation. Any right that she may have had in the suit property was extinguished by the ruling delivered on February 4, 2022 in Nairobi High Court succession cause No 1520 of 2016 which was never appealed.

35. And since no *prima facie* case has been established, there would be no need to consider the other grounds. As was held in *Nguruman Ltd* (supra): -

If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”

The applicant is clearly not deserving of the orders of temporary injunction as sought.

36. Ultimately however and having considered all the issues herein, I am persuaded that both the plaint dated February 17, 2022 and the notice of motion grounded on it are *res – judicata*. They are accordingly struck out with costs to the 1st and 3rd respondents.

BOAZ N. OLAO.

J U D G E

7TH JULY 2022.

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 7TH DAY OF JULY 2022
BY WAY OF ELECTRONIC MAIL.**

BOAZ N. OLAO.

J U D G E

7TH JULY 2022.

