



**Mubichi (Legal representative of the estate of Patrick Mubichi  
M'Amburugua (Deceased) v Mworia (Environment and Land Appeal  
E005 of 2020) [2022] KEELC 14505 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14505 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E005 OF 2020  
CK NZILI, J  
NOVEMBER 2, 2022**

**BETWEEN**

**ANN NKECHI MUBICHI (LEGAL REPRESENTATIVE OF THE ESTATE OF  
PATRICK MUBICHI M'AMBURUGUA (DECEASED) ..... APPELLANT**

**AND**

**JOSHUA KIOME MWORIA ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. Mrs. L.N Juma (SRM)  
delivered on 13.10.2020 in Meru CM ELC Case No. 5 of 2020)*

**JUDGMENT**

1. Through a memorandum of appeal dated October 16, 2020, the court is asked to find the order or ruling of the trial court delivered on October 13, 2020 in which the appellant's suit was struck out for lack of standing to sue and for being *res judicata* and bad both in fact and on law.
2. The grounds relied upon to overturn the said ruling are that the trial court:
  - i. Demonstrated limited comprehension of the requirements to prove the doctrine of *res judicata*.
  - ii. Erred in finding a limited grant ad litem relied upon by the appellant was specifically limited to one suit contrary to paragraph 14 of the 5<sup>th</sup> schedule of the Law of Succession.
  - iii. Failed to be guided by the list of authorities and submissions relied upon by the appellant.
  - iv. Was biased, the ruling was ill reasoned, lacked merits and was not grounded on any sound legal principles and or legal jurisprudence.



3. This being a first appeal the mandate of this court is to re-look, re-hearse and re-appraise itself on the lower court record and come up with independent findings and conclusion on both facts and the law. See *Abok James Odera t/a AJ Odera & Associates vs Kenya Posts & Telecommunications Corporation* (HCCC No 51808 of 1990).
4. At the lower court, the appellant described herself as the widow and the legal representative of the estate of Patrick Mubichi M'Amburugua, the registered owner of LR No. Kiirua/Naari/572 later subdivided into 6 parcels LR No 2186 – 2191. She averred that the suitland had been inherited from Amburugua Kanyoro, who was then holding it in trust and for the benefit of the family. Her claim against the respondent was based on fraudulent and corrupt registration of mutation form dated September 10, 1999 subsequent transfer and registration of LR No Kiirua/Naari/2186 and the illegal issuance of a title deed on March 15, 2019 to the respondent without any succession proceedings.
5. The appellant sought for declaratory orders that the transfer of LR No Kiirua/Naari/2186 from the name of the deceased to the respondent was illegal, fraudulent, criminal act and an order nullifying or cancelling the said transactions so that the suit property can revert to the estate of the deceased.
6. The plaint was supported by the appellants witness statement, list of documents among them letters of administration ad litem, copy of death certificate, green card for LR No Kiirua/Naari/572, mutation form dated September 10, 1997, consent judgment form dated September 10, 1997, consent judgment dated June 14, 1999, Meru HC Misc App No 83 of 1999, injunction order dated June 30, 1999 and search certificate for LR No Kiirua/Naari/2186.
7. The appellant alongside the plaint also filed an application dated July 7, 2020 seeking for inhibition orders against the suit land pending hearing and determination of the suit.
8. The respondent filed a notice of preliminary objection and a replying affidavit sworn by Joshua Kiome Mworio on July 24, 2020 opposing the notice of motion dated July 7, 2020 on the basis that there were similar suits numbers. CMM 437/05, High court Misc Civil Application No 408/96, HCC 172/2014 and HC Misc 83/99 which were consolidated with the CMCC no 172/14 as the lead file where the appellant was the plaintiff, her deceased husband the 1<sup>st</sup> defendant and the respondent the 2<sup>nd</sup> defendant. It was averred that the appellant failed to prosecute the suits which were subsequently dismissed for want of prosecution and has never been appealed against. That before the demise of the appellant's deceased husband, he had consented to the transfer and given the consent judgment in HCC 127 of 1998, the respondent used the judgment to transfer the land.
9. The appellant, filed a further affidavit sworn on August 5, 2020 claiming that the respondent had misrepresented the facts more so regarding LR No Kiirua/Naari/2186 which came into existence two years after the death of the deceased, the consent judgment was over LR No 572 and not LR No 2186, the consent had expired prior to death and stood annulled by the dismissal of the suit, was time barred in law and could not be used to transfer the land without a letters of administration.
10. Parties field written submissions dated July 27, 2020 and July 6, 2020 and July 29, 2020 respectively.
11. On her part, the appellant submitted the purported subdivision and transfer was done on February 20, 2019 without letters of administration hence the transfer was not only illegal but also fraudulent. Based on section 68 of the *Land Registration Act*, the appellant urged the court to stop the transaction until the suit was heard and determined.
12. Regarding the preliminary objection, that the appellant lacked locus standi and the suit was *res judicata*, she relied on the caselaw of *Re Estate of Morarji Bhanji Dhanak (deceased)* (2000) eKLR and paragraph 14 of the 5<sup>th</sup> schedule the *Law of Succession Act* on the proposition that once a person was



- granted ad litem grant, he had the capacity to represent the estate of the deceased in any cause or suit touching on the estate of the deceased. The appellant urged the court to find she was properly before the court by dint of sections 1A and 1B Civil Procedure Act and article 159 2 (d) of the Constitution.
13. On the issue of *res judicata* the appellant submitted that dismissal of a suit for want of prosecution was not covered by section 7 of the Civil Procedure Act since the suit was not heard and determined on merits by a competent court. Reliance was placed on Nathaniel Ngure Kibiu vs Housing Finance Company of Kenya (2018) eKLR.
  14. Further the appellant submitted that the issues in the former suit and the current suit were materially different since LR No 2186 came into existence after Patrick Mubichi (the deceased) had died on June 1, 2017.
  15. The respondent submitted that an inhibition order was discretionary in nature only assured after considering *inter alia*, merits of the case and the mischief involved.
  16. Further the respondent submitted that the attached limited grant was only for purposes of filing ELC No 129 of 2016 hence for this, suit the appellant lacked capacity to sue and further she was using the suit to overturn the decisions in HCC No 127/98 and 172/2014. Reliance was placed on Mwambeja Ranching Co Ltd vs Kenya National Capital Corporation (2015) eKLR on the proportion that litigation must end.
  17. The trial court proceeded to uphold the preliminary objection and dismissed the application for inhibition triggering this appeal.
  18. In line with order 42 Civil Procedure Rules, parties have filed written submissions on account of this appeal dated June 15, 2022 and July 5, 2022 respectively.
  19. The appellant submitted that a suit dismissed for want of prosecution cannot be a basis to raise a preliminary objection on account of *res judicata* since the matter is not heard and finally determined. For this proposition, reliance was placed on Cosmas Mrombo Moka vs Cooperative Bank (K) Ltd & another (2018) eKLR citing with approval KCB Ltd vs Benjob Amalgamated Ltd (2017) eKLR, Tee Gee Electricals & Plastics Co Ltd vs KIE Kisumu CACA NO 333 of 2001, Diwafa Investments Ltd vs Joakim Musyoki Kiiro (2019) eKLR, MWK vs AMW (2016) eKLR. In Re- Estate of Samuel Githio alias Ngugi Githui deceased (2019) eKLR, Michael Bett vs Jackson Koech (2019) eKLR.
  20. The appellant on account of ground 2 of the appeal sought to abandon the same on the reason that the appellant had obtained a fresh grant *vide* Meru CM's Succession Cause No 21 of 2022.
  21. The issues for determination are: -
    - i. Whether the respondent's preliminary objection was merited.
    - ii. If the trial court applied the law on preliminary objection based on the facts obtaining in the circumstances.
  22. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See Mutinda Mule vs IEBC & another (2014) eKLR.
  23. In Raila Odinga vs IEBC (2017) eKLR, the court gave a warning that in an adversarial system such as ours, the purpose of pleadings is to enable the other side to know and prepare for what the party suing is claiming to avoid a trial through ambush. Similarly, the court held that pleadings enable the court to know and expedite the suit based on the pleadings before it. The court also stated that parties must not be allowed to travel outside their pleadings.



24. Having this background in mind, the primary pleadings before the trial court were the plaint dated July 7, 2020 and the supporting documents in line with order 3 rule 2 [Civil Procedure Rules](#).
25. The respondent entered appearance in line with order 6 rules (1) (2) and (3) but failed to comply with order 7 rule (1) (5) [Civil Procedure Rules](#) and plead any material facts as required under order 2 rule 3 thereof. Instead the respondents filed a preliminary point of law presumably based on order 2 rule 9 [Civil Procedure Rules](#).
26. As indicated above the trial court directed parties to file written submissions on both the preliminary objection and the notice of motion dated July 1, 2020.
27. In this matter, there is no dispute that the facts as pleaded by the appellant remain unchallenged by the respondent through any known pleading in law.
28. A preliminary objection was described in the case of *Mukbisa Biscuit Manufacturers Ltd vs West End Distributors Ltd* (1969) EA 696 as one raising a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A preliminary objection cannot be raised if any facts have to be ascertained or if what is sought is the exercise of the court's discretion. In *Oraro vs Mbajo* (2005) eKLR, the court stated a point of law should not be blurred with factual details liable to be contested and that an assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not and as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
29. In *Aviation and Allied Workers Union of Kenya vs Kenya Airways Ltd & another* (2015) eKLR, the apex court stated that a preliminary objection may be raised on a pure question of law and to discern such a question of law, the court must be satisfied that there is no proper contest as to the facts.
30. In *IEBC vs Maina Kiai and 5 others* (2017) eKLR, the apex court held that for the doctrine of res judicata to be invoked, the suit or issue must have been directly and substantially in issue in the former suit, that the former suit must have been between the same parties, that the parties must have been litigating under the same title; that the issue must have been heard and finally determined in the former suits and that the court that formerly heard and determined the suit was competent to try the subsequent suit.
31. As to the application of res judicata in suits dismissed for want of prosecution, the Court of Appeal in *Michael Bett Sibor vs Jackson Koeh* (2019) eKLR took the view that such a judgment does not satisfy the requirements of section 7 [Civil Procedure Act](#) since the issues raised in the suit are not determined and addressed to finality since such a judgment was a technical knockout.
32. In the Tee Gee Electricals (supra) the Court of Appeal was clear that res judicata only applies where the matter has been heard and determined on merits and not where the matter was disposed of by the court due to want of prosecution. See also *Caneland Ltd and others vs Dolphin Bank Ltd* CA Civil Appeal No 20 of 2000.
33. In this appeal the respondent had not placed anything before the trial court by way of pleaded facts and documentation that there were previous pleadings and judgments involving the same parties, same property, same issues and which had been determined to finality by a court of competent jurisdiction.
34. The appellant had pleaded her cause of action arose on February 10, 2019 when the respondent fraudulently transferred and registered LR No 2186 into his name, hitherto a portion of LR No 572 in the name of her deceased husband, who had passed on on June 1, 2017. Her complaint was that the transaction occurred without letters of administration and therefore was contrary to the [Law of Succession Act](#). The appellant attached to the plaint a copy of the grant, death certificate, mutation form,



- consent judgment, search certificate and an untypical order. The search certificate confirmed that the title deed for LR No 2186, in favour of the respondent was registered on February 20, 2019 long after her late husband had passed on.
35. In the body of the plaint, the appellant had pleaded the history of the previous suit[s] between her, the respondent and the deceased to an extent of being consolidated into Meru CMCC No 172 of 2014.
  36. The said facts were responded to with a preliminary objection. The preliminary objection did not specifically deny any of the facts contained in the plaint.
  37. Given the pleadings, the question then is whether based on the facts before the court, one would say that the respondent's preliminary objection fitted the description of and the definition of a preliminary objection as per the above cited case law.
  38. To start with, there was nothing pleaded by the respondent to challenge the facts as presented by the appellant on the manner the respondent had dwelt with the property of a deceased person without the involvement of a legal representative contrary to section 54 of the [Law of Succession Act](#)
  39. The appellant had pleaded the date of death of her late husband, the date of the transfer and registration of the property forming part of the deceased estate. This had not been challenged by way of any pleadings to the contrary. Instead, the respondent raised general assertions under the guise of a preliminary objection, which ideally the trial court could not determine since they required factual evidence and back up information.
  40. The respondent had not denied that he appellant was a wife of the deceased nor had he filed anything to challenge the limited grant ad litem which was before the court and issued by a court of competent jurisdiction and for that matter a High Court.
  41. In [John Florence Maritime Services Ltd & another vs Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) eKLR the apex court alluded to the procedure of raising the plea of *res judicata* that it is anchored on evidential facts and that such facts ought to be properly raised by way of grounds of opposition and through a replying affidavit. The court said the doctrine is based on the principle of finality which is a matter of public policy as one of the pillars upon which our judicial system is founded so as to prevent a multiplicity of suits which ordinarily clog the courts, occasion unnecessary costs and ensures that litigation comes to an end.
  42. The court set out the key elements to be met before a plea of *res judicata* is taken as that; - a former judgment was final, made on merits, by a court of competent jurisdiction between the same action, over identical parties on the same subject matter and the same cause of action.
  43. In this matter the respondent seems to have resorted to written submissions and a replying affidavit as a means of laying evidentiary facts to argue the preliminary objection. Written submissions however powerful and forceful cannot replace pleadings and takes the place of evidence. See [Daniel Toroitich Arap Moi vs Stephen Mwangi Muriithi](#) (2014) eKLR.
  44. Touching on the issue of the letters of grant ad litem, which was the second limb of the preliminary objection, the respondent took the view that the grant the appellant held was limited to a specific case and hence could not form the basis to file the suit. On the other hand, the appellant submitted that the same was in order by dint of paragraph 14, 5<sup>th</sup> schedule of the [Law of Succession Act](#). She also invoked sections 1A, 1B of the [Civil Procedure Act](#) & article 159 2 (d) of the [Constitution](#) as regards the overriding objections of this court.



45. In *Morjaria vs Abdallah* (1984) KLR 490 the Court of Appeal held that the purpose of a grant of letters of administration ad colligenda bona was to collect the property of the deceased person and could not include the rights to take the place of the deceased for the purpose of the institution an action or appeal especially where there was a specific provision for that purpose in paragraph 14 of the 5<sup>th</sup> schedule to the *Law of Succession Act*.
46. In *Peter Owada Ogwang vs Jared Obiero Ouya* (2014) eKLR, the court said a limited grant ad colligenda bona could not be used to represent a deceased party in a suit. The court however said it was in order to convert the grant of letters of administration ad colligenda bona to a grant limited to the prosecution of the case before the High Court.
47. Additionally, the court said that the appropriate form was form 47 in the 1<sup>st</sup> schedule as provided by rule 36 (2) of the *Probate & Administration Rules*, a grant specifically used to the purpose only of representing the appellant in the appeal and held that those words in themselves constituted a valid grant under rule 14 thereof
48. In *Martha Diro Odero (suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndiro (deceased) vs Come Cons Africa Ltd* (2015) eKLR, the Court of Appeal held a party had the requisite *locus standi* to institute a suit where the grant of letters of administration ad colligenda bona was for the collection of assets of the deceased including the filing of suit to claim the deceased properties.
49. The major complaint by the respondent in this matter was that the limited grant held by the appellant was specific to a given suit namely ELC No 129 of (2016) OS and not for the suit before the trial court.
50. In *Re The Matter of the Estate of Moraji Bhanji Dhanak (deceased)* (2000) eKLR, the court cited with approval section 72 of the Interpretation and General Provision Act (cap 2) which states that form shall not be void if it did not affect the substance of the instant instrument or document and which was not calculated to mislead.
51. In this appeal, the court was informed both orally and through written submissions that the appellant has initiated Meru CMCC Succession Cause No 21 of 2022.
52. In my considered view the defect if any in the grant was curable by exercise of the court's discretion under sections 1A & 1B *Civil Procedure Act* and article 159 (2) (d) of *the Constitution* since the same was based on form but not the substance. The respondents did not also give any details if there was a pending suit by that case number.
53. My finding is that the objection required facts and evidence to be adduced hence fell short of what amounts to a preliminary objection.
54. The trial court in my view had no assumed facts to base the law on to make a definite finding on the two assertions that the appellant lacked *locus standi* and secondly that the suit before it was *res judicata*.
55. The appellant had placed before the trial court a limited grant issued by the High Court Meru giving her the capacity to sue. The giving out of a specific case number did not in any way materially prejudice the respondent and or diminish the appellant's capacity to institute the suit. The defect in my view was curable by way of an amendment to the grant.
56. The upshot is this appeal has merits and is allowed with costs.  
Orders accordingly.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 2<sup>ND</sup> DAY  
OF NOVEMBER, 2022.**

**In presence of:**

C/A: Kananu

No appearance

**HON. C.K. NZILI**

**ELC JUDGE**

