



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC APPEAL CASE NO. 05 OF 2019**

**SILAS NJERU M'RITHAA.....APPELLANT/APPLICANT**

**VERSUS**

**M'RITHAA THAARA.....RESPONDENT**

**RULING**

1. This Ruling concerns an application brought to court by way of a Notice of Motion dated **28<sup>th</sup> August, 2019**. The applicant's advocate states that he has brought the application in court under Order 43 of the Civil Procedure Rules, 2010, Section 1, 1A, 3, 3A, 63(e), 95 of the Civil Procedure Act, Section 4 of the Appellate Jurisdiction Act & Article 159(2)(d) of the Constitution of Kenya and all other enabling provisions of the law.

2. The application seeks the following orders:-

1. That this court be pleased to grant the applicant leave to lodge an appeal against the ruling delivered on 15<sup>th</sup> July, 2019 as a matter of formality.

2. That consequent to 1 above, the honourable court be pleased to grant leave to file and serve Notice of Appeal against the ruling dated 15<sup>th</sup> July, 2019 out of time.

3. That costs of this application be in the cause.

3. The application has the following grounds:

a. That the ruling of the court was delivered on the 15<sup>th</sup> day of July, 2019.

b. That the applicant herein is aggrieved with the decision of the court to summarily reject the intended appeal. As such, he is seeking leave to appeal against the summary rejection of his appeal as required by the law (as a formality)

c. That further, the time allowed to file an appeal has run out.

d. That the respondent is unlikely to suffer prejudice.

e. That the delay herein is not so inordinate or so great as to be inexcusable.

f. That the intended appeal is arguable and (sic) high chances of success.

g. That this honourable court (sic) unfettered discretion in granting leave to file an appeal out of time.

h. That it is in the interest of justice that this application be allowed.

i. That this is a land case thus a party should be allowed to exhaust all avenues

j. That one cannot file and appeal out of summary dismissal without the courts (sic) leave.

4. The application is supported by the affidavit of the applicant's advocate which states:

**SUPPORTING AFFIDAVIT**

I, ELIJAH K. OGOTI, an advocate of the High Court of Kenya, do wish to state as follows:-

1. That I am the advocate on record for the applicant herein hence capable of swearing this affidavit.
2. That this appeal was summarily rejected through a ruling dated 15<sup>th</sup> July, 2019 which rejection was unfair as the applicant herein who was the appellants was not accorded an opportunity to be heard.
3. That there are serious issues that need to be canvassed so as to shed light to this matter and the applicant should be granted leave to appeal against the summary rejection.
4. That the appeal herein is with regards to a civil cause and the applicant ought to clarify this confusion and this will only be achieved through a fair hearing.
5. That the summary rejection of the appeal omitted to note that the parcel appealed against herein is not a subject of succession as it is not property of a deceased.
6. That the applicant has now instructed me to seek to (sic) leave to appeal against the said rejection.
7. That the applicant is one month late in instructing me due to the fact that he did not have money to finance this application.
8. That the delay herein is excusable as it is not so inordinate.
9. That I now pray for this application to be allowed for the interest of justice.
10. That what is deponed herein above is true to the best of my knowledge, information and belief.

5. The respondent has responded to the application through a Replying Affidavit sworn on 26<sup>th</sup> September, 2019 which states:

**REPLYING AFFIDAVIT**

I M'RITHAA THAARA of Care of Post Office Box Number 310-60200 Meru make oath and state as follows:

1. That the contents of the applicant's notice of motion and supporting affidavit dated 28<sup>th</sup> August, 2019 have been read and explained to me by my advocate on record and I have understood the same.
2. That the applicant was required to make application to seek leave of the court to lodge his appeal against the ruling dated 15<sup>th</sup> July, 2019 within 14 days from the date of delivery.
3. That it is over 45 days since the honourable court delivered its ruling dated 15<sup>th</sup> July, 2019 to summarily dismiss the applicant's appeal and the applicant has never sought the leave of the court to lodge his appeal against the said ruling.
4. That the applicant has not advanced any good reasons as to why he delayed to file his application to seek leave to lodge appeal against the ruling of the court except to say that he did not have money to finance the said application.
5. That furthermore, there is a doubt that the said application is made by the applicant himself because the same has been sworn by his advocate and not the applicant.
6. That I am advised by my advocate on record which advice I believe to be true that the applicant is required to bring first an application seeking leave to bring his application for leave to lodge appeal since the 14 days within which he was required to bring the same have long expired.
7. That the applicant's delay in seeking leave to lodge appeal is very inordinate and he has not given any ground for such delay to warrant the court excising (sic) its discretion to grant such leave.
8. That the applicant has also not shown that his intended appeal is arguable and has high chance of success.
9. That I am further advised that the applicant cannot seek leave to file and serve notice of appeal against the court's ruling dated 15<sup>th</sup> July, 2019 in the same application as he has not yet been granted leave to lodge the said appeal and which leave he has never sought.
10. I pray that the plaintiff's application dated 28<sup>th</sup> August, 2019 be dismissed with costs to the respondent.

11. That what is deponed herein is true to the best of my knowledge, belief and information.

6. When the application came for directions on 4<sup>th</sup> November, 2019, the applicant's advocate was not in court. The file was put aside for one hour as requested by the applicant's son, Mike Njeru. After one hour, Mr. Elijah Ogoti, the applicant's advocate was nowhere to be seen.

7. When the hearing proceeded, M/S Atieno, the Respondent's advocate, told the court that the application ought to be dismissed as the applicant had not explained the inordinate delay in filing the application. She told the court that she fully relied on the respondent's replying affidavit sworn on 26<sup>th</sup> September, 2019. In the absence of the Applicant's advocate, I have fully taken into account his pleadings.

8. To put matters fully in their proper perspective, I reproduce in full herebelow this court's ruling delivered on **15<sup>th</sup> day of July, 2019.**

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 05 OF 2019**

**SYLAS NJERU M'RITHAA.....APPELLANT**

**VERSUS**

**M'RITHAA THAARA.....RESPONDENT**

**RULING**

**RULING ON SUMMARY REJECTION OF APPEAL IN CONSONANCE WITH SECTION 79 B OF THE CIVIL PROCEDURE ACT**

1. This ruling concerns my decision to summarily reject the intended appeal in terms of Section 79 B of the Civil Procedure Act.

2. The Memorandum of Appeal dated 3<sup>rd</sup> June, 2019 states as follows:

**MEMORANDUM OF APPEAL**

1. That the learned Senior Resident Magistrate erred in law and fact in interpreting the principal (sic) of Res judicata as enshrined in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.

2. That the learned Senior Resident Magistrate specifically erred in law and fact in not differentiating between a Succession case and a pure Civil Case.

3. That the learned Senior Resident Magistrate erred in law and fact by not finding that nowadays Succession courts specifically deals (sic) with property of deceased and anything on top is a different issue to be dealt (sic) in the appropriate avenue (civil case).

4. That the learned Senior Resident Magistrate erred in law and fact by not giving the plaintiffs submission the pinch of salt it deserves (to consider it twice) due to "the tiny line of the plaintiffs suit VIZ-A-VIS (sic) the finalized Succession case.

**Reasons whereof** the appellant prays for **orders**:-

a) That the appeal be allowed and the ruling/order of honourable Senior Resident Magistrate hereto be set aside and this suit be reinstated for hearing by a different magistrate.

b) That the costs of this appeal and the lower court case be awarded to the appellant.

3. I have carefully considered the Memorandum of Appeal and the ruling which spawned this intended appeal. I reproduce the said ruling in full herebelow.

**RULING ON THE PRELIMINARY OBJECTION**

a) BACKGROUND

The defendant objector filed a preliminary objection dated the 14/10/2018 in which he raises objections to the suit as follows;

1. The suit is *res judicata* and offends section 7 of the Civil Procedure Act.

2. The subject matter being Land parcel MWIMBI/S. MUGUMANGO/63 was dealt with in Chuka High Court Civil appeal no 33 of

2015 and judgment dated the 9<sup>th</sup> June 2016 and ruling on the 13<sup>th</sup> December 2016.

### 3. Costs

The Defendant objector in his submissions states as follows; Further to his defence he raised the P.O that the issues raised in this suit are similar to those raised in CHUKA PMCC SUCCESSIO CAUSE NO 121 of 2008 where the court directed that the defendant was an equal and direct beneficiary of the estate of the deceased. Pursuant to the judgement an appeal was preferred in High court Civil Appeal no 33 of 2015 formerly Meru HCCA 68 of 2010 which appeal was dismissed for lack of merit. Vide an application to the same court the said application was dismissed. The same exhibits being relied on were produced in the former suits. That that being the case the only avenue for the Plaintiff it to appeal the rulings and judgement to a higher court. That the Appeal dealt with the same issue of offending section 7 of the Civil Procedure Act. The subject matter is the same and the parties the same. The plaintiff also raised the issue of the suit property in the succession cause and this is a bid to vest the Defendant twice. The property was dealt with in the Chuka HCCA NO 33 of 2015. They relied on the case of MAITHENE MALINDI ENTERPRISES LIMITED V MANIKIN and 2 OTHERS MOMBASA CA NO 68. The issue of equitable distribution was directly and substantially in issue in the former suit. They also relied on the case of KCB V BENJOH AMALGAMATED NRB CA NO 107 OF 2010 (2017) eKLR where the court stated "...res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belongs to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time..." That the Land parcel NO MWIMBI/MAGUMANGO/63 was canvassed before in the appeal. He also relied on the case of CHRISTOPHER ORINA KENYARIRI V SALAMA BEACH LIMITED (2017) eKLR that the party cannot introduce a new cause of action to seek a remedy that was previously denied. The Defendant prays that the suit be dismissed.

The Plaintiff had been granted 7 days leave to file and serve his submissions from the 16<sup>th</sup> April 2019 but instead filed his submissions on the 15<sup>th</sup> May 2019 a whole month later ideally the plaintiff has no audience over the issue without further leave. This court will however grant him the benefit of doubt as not to unseat him from the seat of justice. The court will only deal with real issues as required by law. He submits that the two parcels are not related as one dealt with a deceased for the succession cause and one for the current Defendant (ie S.MUGUMANGO /63. That the current parcel was only mentioned in *obita dicta*. That the issue should be canvassed in full he relied on the constitution article 159 and 501, 2 (k). That the party should be allowed to unleash his frustrations in court. That the suit involved two different parcels, tow (sic) different persons one being (sic) living. That succession should only deal with the estate of the deceased and any other be filed in the environment court. The PO required facts be adduced to prove it. That the authorities filed by the Defendant are irrelevant. He prays that the P.O be dismissed.

### ANALYSIS

I have considered the affidavits filed by the parties and I have also considered the arguments raised by the parties in this suit as well as the relevant law and authorities applicable.

The main issues for determination are

- i) whether the suit is *res judicata*
- ii) Or whether the plaintiff is entitled to the orders sought.

The Black's law Dictionary defines *res Judicata* as "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

In the case of CHRISTOPHER KENYARIRI V SALAMA BEACH (2017) eKLR, The court clearly stated "... the following elements must be satisfied...in conjunctive terms;

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

It is designed as a pragmatic..protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves the court requires parties to that litigation to bring forward their whole case, and will not except under special circumstances permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case the plea of *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment but every point which properly belonged to the subject of litigation and which the parties exercising diligence might have brought forward at the time."

In applying the issue before me and in comparison the parties are similar between this case and the CHUKA HCC Appeal number 33 of 2015 the same having emanated at the lower court in PMCC NO 121 of 2008.

The properties in the Lower court case no 121 of 2010 as well as the appeal are similar, inter alia PARCELS NO MWIMBI/MUGUMANGO 193, and MWIMBI/S.MUGUMANGO/139 which then led to the MUGUMANGO /63 was substantially in issue and was allegedly raised at the submission stage which was deemed irregular hence disregarded at both the appeal and the Magistrate court. The issue was canvassed at length in the appeal by even introducing authorities against it and not as *obita dicta*. The Plaintiff in itself under paragraph 14 states that the land belonged to the father and was given to the Plaintiff as a share in trust. The Defence is clear that the Plaintiff is claiming the land through his father the deceased of which he had not raised any claim prior to his death, clearly from a succession claim. The plaintiff seems to be claiming through him. The case was heard and determined an appeal even preferred and dismissed.

I must note that there are substantial similarities in the claim seeking to have the portion in parcel MUGUMANGO/63 granted to the plaintiff.

As was the case in **DR ALI WARIO V DR JOHN NGONDU (2011) eKLR** The court was categorical that “Section 7 of the Civil Procedure Act forbids the court from entertaining an action in which the matters directly or substantially had been directly and substantially in issue in a former action which had been heard and finally determined by a competent court...”the definition of Res Judicata cannot be over emphasised even when it comes down to applications. Section 7 explanation 5 of the Civil Procedure Act is also clear as it states, “*any relief claimed in a suit which is not expressly granted by the decree, shall for the purpose of this section be deemed to have been refused*”.

The Magistrate court was competent as was the High Court. Indeed the principle that there must be an end to litigation, and this court cannot sit on appeal of a high court decision just to facilitate that end in defiance of express orders of the High court. Until and except where the high court decision is overturned by a higher court this court shall be bound by it.

Introducing a new suit years later under a different fora touching on the same issues ie a share of the parcel, which ought to have been directly and substantially in issue in a former suit, in bid to obtain orders earlier refused by the court amounts to res judicata. The court has noted that the said prayer simply turned to a transfer instead of administration/ subdivision/ distribution. It is clearly a bid to obtain at last outcomes favourable to him after the refusal by the court to grant the orders as sought before and after lengthy periods of delay. The preliminary objection is upheld as having merit.

The upshot of the foregoing is that:

The suit is *res judicata* and the same is dismissed with costs to the Defendant.

Right of appeal.

**DATED AND SIGNED AT CHUKA THIS 20TH MAY 2019**

.....

**HON M. Sudi**

**SRM**

**Delivered in open court on the 21<sup>st</sup> May 2019 the presence of:**

**Advocate for the Plaintiff:**

**Advocate for the defendant:**

**HON M. Sudi**

**SRM**

4. I find the ruling delivered by Hon. M. Sudi, SRM Chuka, on 20<sup>th</sup> May, 2019 well-reasoned and a correct and a veritable postulation and exposition of applicable law. I agree that the suit which has spawned this intended appeal is res judicata Chuka H.C.C Appeal No. 33 of 2015. In the circumstances, I decline to escalate this dispute to become an appeal.

5. The intended appeal is hereby rejected in terms of Section 79 B of the Civil Procedure Act.

6. No order as to costs is issued.

**Delivered in chambers at Chuka this 15<sup>th</sup> day of July, 2019 in the presence of:**

**CA: Ndegwa**

**P.M. NJOROGE**

**JUDGE**

9. I have carefully considered the parties' pleadings and the oral submissions made by the respondent's advocate.

10. Order 43 upon which the applicant states that he buttresses his application states under subrule 3 that: ***"An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order."*** Clearly the applicant has fallen foul of the apposite requirements.

11. I opine that the applicant's advocate has taken this matter casually. His prayer No. 1 asks the court to grant that order as a matter of formality. Granting orders for appeals to be filed out of time is guided by law and should not be canvassed in a cavalier manner. The applicant only says that time allowed to file an appeal has run out and that he lacked funds to file a Notice of Appeal and this Application. I ask the question: ***"Does filing a Notice of Appeal require substantial funds?"*** The obvious answer is a Capital ***"NO"***

12. I agree with the respondent's assertion that there has been an inordinate delay in the filing of this application. Instead of the notice of Appeal being filed by around the **30<sup>th</sup> of July, 2019**, this application was filed on **28<sup>th</sup> August, 2019**. I do also agree with the respondent's assertion that the applicant cannot seek leave to file and serve a notice of appeal against the court's ruling delivered on **15<sup>th</sup> July, 2019** in this application **SINCE** he has not been granted leave to lodge an appeal.

13. This court hereby declares itself functus officio.

14. In the circumstances, this application is hereby dismissed.

15. Costs shall follow the event and, therefore, costs for this application are awarded to the respondent.

16. Orders accordingly.

**Delivered in open Court at Chuka this 4<sup>th</sup> day of November, 2019 in the presence of:**

**CA: Ndegwa**

Mike Njeru s/o Silas Njeru for the Appellant

Miss Atieno for the Respondent

**P. M. NJOROGI,**

**JUDGE.**