



Wanderi (Suing as the Personal Representative of the Naomi Muthoni Wanderi - Deceased) v Rono & 2 others; Ndung'u & 2 others (Third party) (Civil Appeal 158 of 2018) [2025] KEHC 5889 (KLR) (Civ) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 158 OF 2018

HI ONG'UDI, J

MAY 8, 2025

BETWEEN

SALOME WANGARI WANDERI (SUING AS THE PERSONAL REPRESENTATIVE OF THE NAOMI MUTHONI WANDERI - DECEASED) APPELLANT

AND

DIXON KIPNG'ETICH RONO 1ST RESPONDENT

GEOFFREY MAIYO BITOK 2ND RESPONDENT

JUDITH NDUNGE NGUNIA 3RD RESPONDENT

AND

JANE WAIRIMU NDUNG'U THIRD PARTY

JACKSON NJOROGE KIMENJE THIRD PARTY

SUSAN NYANG' T/A NYANG' & CO ADVOCATES THIRD PARTY

(Being an appeal from the Judgment dated 21st September 2018 by Hon. G.H. Oduor (CM) in Nakuru CMCC No. 302 of 2004)

JUDGMENT

1. Salome Wangari Wanderi hereinafter referred to as the appellant was the plaintiff in the lower court and the 1st, 2nd and 3rd respondents were the defendants while the third parties held the same position. The appellant vide the plaint dated 11th February 2004 sued the said 1st, 2nd and 3rd respondents claiming general damages under the Law Reform Act and Fatal Accidents Act, general damages for lost years,



special damages and costs of the suit plus interest at court rates. The claim was based on the injuries the deceased sustained as a lawful passenger in motor vehicle registration number KWZ 108 Toyota saloon negligently driven by the 1st respondent along Nakuru- Ravine road at Kabarak resulting in an accident. The respondents denied the claim.

2. The matter was fully heard with the appellant and 2nd respondent adducing evidence. In its judgment delivered on 21st September, 2018 the trial court held that the claim by the appellant had been settled in CMCC No. 570 of 2004, and there was no cause of action which lay in favour of the deceased's estate. The suit was found to be res judicata and the same was dismissed in its entirety with each party bearing its own costs.
3. The appellant being aggrieved by the whole judgment lodged this appeal dated 9th October, 2018 setting out the following grounds: -
 - i. That the trial magistrate erred in law and fact in holding that the matter before him was res judicata despite overwhelming evidence before him that Nakuru CMCC No. 570 of 2004 was as a result of fraud perpetrated against the estate of Naomi Muthoni Wanderi by the third parties who did not adduce evidence before him.
 - ii. That the learned trial magistrate erred in law and fact in failing to appreciate the effect of the evidence before him to the effect that CMCC No. 570 of 2004 was as a result of fraud which could not result to a valid settlement of the claim before the court.
 - iii. That the learned trial magistrate erred in law and fact in holding that Nakuru CMCC No. 302 of 2004 was res judicata when there was no evidence before him to show that the Plaintiff in CMCC No. 570 of 2004 was the same person as in Nakuru CMCC No. 302 of 2004 and despite the respondents' admission that the CMCC No. 570 of 2004 was as a result of fraud to defeat the appellant's lawful claim against them.
 - iv. That the learned trial magistrate erred in law and fact in failing to find the third parties liable to the respondents who joined them in the pleadings and who tendered no evidence against him to establish their entitlement to damages paid to them by the respondents.
 - v. That the learned trial magistrate erred in law and fact in failing to appreciate that only one grant of letters of administration in respect of the deceased could have been issued by the court and that the appellant's grant of representation issued on 9th July, 2003 was the first in time and the subsequent grant to the 1st and 2nd third parties issued to them on 4th March, 2004 was null and void for all intent and purposes.
 - vi. That the learned trial magistrate erred in law and fact in failing to consider that the appellant's Nakuru CMCC No. 302 of 2004 was the first suit to be filed before Nakuru CMCC No. 570 of 2004 which was allegedly settled and without any endorsement on settlement in the court file to that effect.
 - vii. That the learned trial magistrate erred in law and fact by failing to consider the respondents' admission that they paid damages to the third parties by error, fraud and or misrepresentation and further erred in refusing to consider the respondents' request to order the third parties to pay the decretal sum paid to them to the appellant herein as the rightful claimant.
 - viii. That the learned trial magistrate erred in law and fact in failing to consider the respondents' admission that the third parties defrauded them in the settlement of claim and further erred by absolving them from any liability by dismissing the appellant's suit.



- ix. That the learned trial magistrate erred in law and fact in failing to enter judgment in favour of the appellant in view of the respondents' admission of liability in the accident and thereafter enter judgment in favour of the respondents' as against the third parties who did not defend the respondents' claim against them in court.
 - x. That the learned trial magistrate erred in law and fact in appearing to condone lawlessness and fraud when there was evidence of such illegalities and lawlessness before him.
 - xi. That the entire judgment is not well thought out and was intended to defeat the ends of justice by dismissing the appellant's case before the trial court.
4. The Appeal was canvassed by way of written submissions.

Appellant's submissions

5. These were filed by Waiganjo & company advocates and are dated 3rd August, 2024 . Counsel gave a brief summary of the lower court case and submitted that the finding by the trial magistrate that the suit was res judicata was not supported by the evidence on record. She placed reliance on section 7 of the *Civil Procedure Act* and the decision in John Florence Maritime Services Limited & another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR where the court observed as follows:

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“(81) We reaffirm our position as in the Muiro Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.....”

See also:

The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, Nairobi
CA No.105 of 2017 [2017] eKLR.

6. Counsel further submitted that Nakuru CMCC No. 570 of 2004 was filed against the respondents and the plaintiffs were Jane Wairimu Ndungu and Jackson Njoroge the (1 and 2nd Interested Parties). However, the said parties never entered appearance and there was no evidence before the court of the nexus between them and the appellant herein. That it was clear that the suit was not res judicata as the parties in both suits were not the same and they were not litigating under the same title. Further, that there was no evidence that the alleged settlement was endorsed by the court so that it may be given legal force of law since no consent was recorded in court. She added that the trial magistrate completely refused and failed to address the issues raised by the defendants against the third parties who did not testify. She urged the court to allow the appeal and set aside the dismissal of the suit and enter judgment in favour of the appellant.

2nd Respondent's submissions

7. These were filed by Obura Mbeche & company advocates and are dated 26th February, 2025. Counsel gave a brief background of the case and identified four issues for determination.



8. On the first issue whether the case is res judicata, counsel submitted that the present suit was an attempt to circumvent the doctrine of res judicata by presenting a slightly altered version of an already decided matter. That allowing such claims would set a dangerous precedent where litigants continuously tweak and re-file cases, thereby undermining the judicial process. He placed reliance on the decision in *John Florence Maritime Services Limited & another (supra)* which stated that:

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

9. On the second issue, whether there was fraud in the compensation, counsel submitted that the appellant failed to prove that there was fraud in the determination of CMCC 570 of 2004 and the suit was dismissed based on the doctrine of res judicata. That the claim in CMCC 570 of 2004 was settled out of court under insurance claim number 508194. Further, that the Insurance Company only settled the claim on the directions of the court and the burden of proof as to whether there was fraud involved rested entirely on the appellants who failed to provide sufficient proof on a balance of probabilities.
10. On the third issue, whether the appellant was negligent, counsel submitted that the appellant was negligent in not moving the court to have the two suits consolidated, that is Civil Case No. 570 of 2004 and Civil case No. 302 of 2004.
11. Regarding the fourth issue, whether the trial court had a duty to determine who the right claimants were, counsel submitted that the court had no duty to determine the rightful claimants as the issue before the trial court involved damages and not the nature of who the rightful claimants to the case were. Further, that throughout the determination of the two suits, the question of who the rightful beneficiaries of the estate were did not arise. Thus, the trial court would not have addressed the same.
12. He placed reliance on the decision *In re Estate of Julius Ndubi Javan Deceased 201: KEHC 8523 (KLR)* where it was stated as follows;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which (sic) prima facie valid should be determined before confirmation”

13. In conclusion, counsel submitted that both suits met the aforementioned dimensions of res judicata since the cause of action arose within the same jurisdiction as in compliance with section 15 of the *Civil Procedure Act*. Thus, this appeal seeks to relitigate, re-agitate and re-canvass matters that were settled with finality by the learned magistrate. He placed reliance on the decision in *Ngugi v Kinyanjui & 3 Others [1989] KLR 146*. He urged the court to dismiss the appeal with costs.



3rd Respondent's submissions

14. These were filed by S.J Nyang' & Company Advocates and are dated 27th January, 2025. Counsel gave a brief background of the lower court suit and submitted that it was not established that the grant of letters of administration produced by the appellant was genuine since nobody scrutinized it and there was no certified copy of the same. Further, that the grant of letters of administration forwarded by them to the Insurance company was scrutinized and payments made accordingly.
15. Counsel further submitted that the 2nd third party /respondent and 3rd third party/respondent were never made aware of the suit in the Nakuru Chief Magistrate's Court Civil Case No. 302 of 2004 until they were invited as third parties. That the issue of the suit having been filed first did not arise and even the Insurance company seems not to have been aware of the same. I say so because had they been aware they would have halted negotiations until the two suits are either consolidated or one withdrawn. Additionally, that the appellant wrongly submitted that the Insurance company admitted liability that they paid the wrong person. Thus, the said submissions were a cover up in trying to give face to a case which was fatally defective and lacked proof as required by the law.
16. Counsel submitted that Nakuru Chief Magistrate's Court Civil Case No. 370 of 2004 had not challenged at all and or reopened to establish the alleged fraud. That the appellant and the defendant's Insurance Company in the lower court suits had a duty to move the court in Nakuru Chief Magistrate's Court Civil Case No. 570 of 2004 either as an interested party so that the issues of fraud would be addressed there, but they failed to do so. Thus, the orders issued in the said case remained intact and Nakuru Chief Magistrate's Court Civil Case No. 302 of 2004 cannot be used as an appeal case. Further, that that the appeal herein is misplaced and misguided as the appellant's claim in Chief Magistrate's Court Civil Case Ne. 302 of 2004 was declared res judicata due to an already settled claim over the same subject matter in Nakuru. She placed reliance on the section 7 of the *Civil Procedure Act*, 2010 and the decision in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (supra). She urged the court to dismiss the appeal with costs.

Analysis and determination

17. This is a first appeal and this court has a duty to re-consider and re-evaluate the evidence on record and arrive at its own independent conclusion. It has to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This has been stated in several decisions among them being *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the Court of Appeal stated:

“An Appeal to this court from a trial court by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must re-consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.
18. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respondent, I find the main issue for determination to be whether the learned trial magistrate erred in dismissing the appellant's suit for being res judicata.
19. It is the appellant's case that the finding by the trial magistrate was erroneous and not supported by the evidence on record. The 2nd and 3rd respondents agree with the decision of the trial magistrate and have urged the court to uphold it. Looking at the impugned judgment the trial magistrate after considering the parties submissions and the evidence, held that the claim by the appellant had already been settled



- in Nakuru CMCC No. 570 of 2004, and was therefore res judicata and went ahead to dismiss the same with each party bearing its own costs.
20. Having carefully perused the lower court record, I note that the appellant's claim for damages in the said suit being CMCC No. 302 of 2024 was against the 1st, 2nd and 3rd respondents and the third parties. The 2nd respondent filed his defence and under paragraph 7 while referring to paragraph 11 of the plaint, averred that the facts giving rise to the appellant's claim were the subject of Nakuru CMCC No. 570 of 2004. He averred further that he would apply for consolidation of the two suits in order for the court to determine the bona fide legal representatives of the estate of the deceased herein.
 21. During the hearing the appellant called two witnesses who told the court that they were not aware of Nakuru CMCC 570 of 2004 or the plaintiffs therein and that they had not been paid by the respondents. The exhibits produced in support of the appellant's case were PEXH1-4. The 2nd respondent called one witness (DW1) who testified that the claim by the deceased's estate had been settled in Nakuru CMCC 570 of 2004 which was the first suit. In support of his testimony he produced Exhibits 1-8. On cross examination he confirmed that they had settled the claim, though it appeared that the compensation did not reach the correct beneficiary. He also stated that they had been defrauded by the plaintiff who was assisted by the 1st third party, in the aforementioned suit.
 22. From the evidence adduced by the defence witness, (DW1), it is clear that the claim allegedly paid in respect of the deceased's estate was done through an out of court settlement. The document relied on in settling the said claim were letters of correspondence between the claimants' advocate and the Insurance company. No evidence whatsoever was adduced by the defence as to the existence of the suit Nakuru CMCC No. 570 of 2004 or a decree which prompted them to settle the claim allegedly brought on behalf of the deceased's estate. Further, the defence witness confirmed that they had been defrauded and ended up paying compensation to the wrong party and not the appellant.
 23. In view of the above, it is my finding that the trial magistrate erred in declaring the appellant's suit as res judicata when no evidence had been adduced in court by the defence proving the actual existence of Nakuru CMCC No.570 of 2004. The Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 held that: -

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is called upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
 24. Since DW1 (Elsie Njagi) an advocate confirmed they had been defrauded by known persons they ought to have followed them for a refund of the compensation paid. They did not do that for reasons best known to them.
 25. The above being the position I allow the Appeal and set aside the Judgment by the lower court. The appellant's suit Nakuru CMCC No. 302 of 2004 is hereby referred back to the Nakuru Chief Magistrate's Court for hearing. The matter should be heard and concluded on priority basis.
 26. Costs of the Appeal shall be borne by the Respondents and & Third parties.
 27. Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 8TH DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.



H. I. ONG'UDI
JUDGE

