



REPUBLIC OF KENYA



**In re Estate of Joshua Githehu (Deceased) (Succession Cause 131 of 1984)
[2024] KEHC 5210 (KLR) (Family) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5210 (KLR)

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

FAMILY

SUCCESSION CAUSE 131 OF 1984

MA ODERO, J

MAY 17, 2024

ESTATE OF JOSHUA GITHEHU (DECEASED)

JUDGMENT

1. Before this court for determination is the Notice of Preliminary Objection dated 13th June, 2023 filed by the Respondents in this matter.
2. The Applicants opposed the Preliminary Objection through their Replying Affidavit dated 29th June, 2023.
3. The matter was canvassed by way of written submissions. The Respondents filed the written submissions dated 30th June, 2023 whilst the Applicants relied upon their written submissions dated 17th July, 2023.

Background

4. This Succession Cause relates to the estate of the late Joshua Mbira Githehu (hereinafter ‘the Deceased’) who died intestate on 23rd May, 1971. The Deceased who was a polygamous man was survived by seven (7) houses and several children as follows;-

1st House

1. Evanson Mbogo Mbira - Son
2. Naomi Wanjiku Mbira - Daughter

2nd House

1. Rahab Njoki Wanene - Daughter
2. John Mukabi Mbira - Son
3. Bridgld Nyambura Ngigi - Daughter



3rd House

1. Joshia Kabocha Mbira - Son
2. Wilfred Mukoma Mbira - Son
3. Wilson Ngigi Mbira - Son
4. Nduta Mbira - Daughter

4th House

1. Grace Gachambi Wanene - Daughter
2. Margaret Wakanyeki Mbira - Daughter
3. Keziah Muthoni Mbira - Daughter

5th House

1. Peter Wanene Mbira - Son
2. Jackson Kibia Mbira - Son
3. Simon Ngigi Mbira - Son
4. Grace Nyakio Mbira - Daughter
5. Mary Wanjiru Mbira - Daughter

6th House

1. Lilian Wambui Mbira - Wife
2. David Wanene Mbira - Son
3. Jackson Walyaki Mbira - Son
4. George Munyua Mbira - Son
5. Joseph Muiruri Mbira - Son
6. James Waweru Mbira - Son
7. Stephen Ruthi Mbira - Son
8. Simon Ngigi Mbira - Son

7th House

1. Lizzie Wairimu Mbira - Wife
2. Samuel Makimei Mbira - Son
3. Simon Ngigi Mbira 'b' - Son
4. John Kuria Mbira - Son
5. Francis Wanene Mbira - Son

5. Following the demise of the Deceased Grant of letters of Administration Intestate was on 1st March 1984 made to the Public Trustee.



6. Following a consent by all the beneficiaries regarding distribution of the estate the Grant was duly confirmed on 9th February, 2000. The consent on distribution was varied on 20th February, 2007 after which a certificate of confirmed Grant was issued to the Public Trustee.
7. By way of summons dated 27th September, 2011 the Administrator of the estate of Mary Nduta Mbiria who was a daughter of the Deceased) sought to have the share of the estate distributed to the 3rd House divided equally amongst the four children of that house including their mother Mary Nduta.
8. The application was heard by Hon. Justice Aggrey Muchelule (as he then was) who *vide* a ruling delivered on 8th April, 2020 dismissed the same with costs.
9. Thereafter the current Applicants Stephen Mbiria Nduta, Josiah Wanene Nduta and Irene Mugure Nduta (all children of Mary Nduta) filed a Notice of Motion dated 12th April, 2023 seeking the following orders:-
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to grant the Applicants the portion that they have lived on for over 20 years namely Parcel number Limuru/Kamirithu/ 3150.
 - iv. That this Honourable Court be pleased to issue a restraining order restraining the Respondents from issuing any further threats of evictions upon the Applicants or carrying out any evictions from the portion of Parcel Number Limuru/Kamirithu/3150 where the Applicants live.
 - v. That the Honourable Court be pleased to issue an order that the portions allocated/issued to the Applicants herein by the entire 3rd house vide the agreement dated 30th November 2013 be registered in the names of the Applicants.
 - vi. That the costs of this application be in the case.”
10. In response to the application the Respondents filed the Notice of Preliminary Objection dated 13th June, 2023, which Preliminary Objection was premised upon the following grounds:-

“That the Applicants Application dated 12th April, 2023 is Res Judicata”

Analysis and Determination

11. I have carefully considered the Preliminary Objection filed by the Objectors as well as the written submissions filed by both parties.
12. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distrobutors Ltd* [1969] E.A in which the court stated as follows;

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued as a Preliminary point may dispose the suit. Examples are an objection of the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration

..... A Preliminary Objection is in the nature of what is used to be a demurrer.



It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

12. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated that

“a Preliminary Objection may only be raised on a “pure question of law”

13. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record”
14. Therefore in order for a Preliminary Objection to succeed, the following tests must be satisfied;-
- i. The Preliminary Objection should raise a pure point of law.
 - ii. The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - iii. The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - iv. A valid Preliminary Objection ought if successful dispose of the entire suit.
15. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
16. The Respondents submit that in view of the Ruling delivered by Hon. Justice Muchelule (as he then was) on 8th April, 2020, the Notice of Motion filed by the Respondents dated 12th April, 2023 is *Res Judicata* and is therefore for striking out.
17. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue is 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”

18. Black’s law Dictionary 10th Edition 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.....”

19. In the Case of *Christopher v Salama Beach* (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus;

- 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.”
20. In the case of *William Koross v Hezekia Kiptoo Komen & Others* [2016] eKLR the Court of Appeal stated as follows:-

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too-human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie res judicata, Y.V Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

21. I have carefully perused the two applications in issue. In the application dated 27th September, 2011 the Applicants sought to have the share of the estate allocated to the 3rd House distributed equally amongst the beneficiaries of Mary Nduta Mbiria.
22. In dismissing that application the court in the Ruling delivered on 8th April, 2020, stated that the parties had entered into a consent regarding distribution of the estate. That this consent formed the basis of the certificate of confirmed Grant which was issued by the court on 9th February, 2000.
23. In that ruling of 8th April, 2020 the Hon. Judge went on to observe that
- “An order of judgment that has been entered into by the consent of the parties can only be set aside or varied by consent. It is trite that a consent order or judgment has contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract, or if certain conditions remain to be fulfilled which are not carried out.....
- The Grounds of setting aside are where the consent orders or Judgment was obtained by fraud or collusion or by an agreement contrary to policy of the court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement”
24. The application dated 12th April, 2023 involves the same parties and seeks orders in respect of the parcel of land known as Limuru/Kamirithu/3150 (hereinafter referred to as ‘the Limuru Property’)
25. I have perused the certificate of confirmed Grant dated 9th February, 2000 and rectified on 20th February, 2007. The mode of distribution contained therein was reached by consent of all the



beneficiaries. The parcel of land known as Limuru/Kamirithu/3150 is not listed as one of the assets of the estate subject to distribution.

26. I have also perused the Affidavit sworn in support of the Petition for Grant of letters of Administration Intestate dated 24th February, 1984 once again this plot 3150 is not listed as one of the assets belonging to the Deceased.
27. In the circumstances the application dated 12th April, 2023 cannot be said to be *Res Judicata* as the same does not relate to the distribution of estate property.
28. However, having said that I do find that the application dated 12th April, 2023 which deals with non-estate property cannot be prosecuted under this succession cause. If the Applicants wish to protect their interest in Plot 3150 Limuru then the correct forum for them to file their claim is in the Environmental and Land Court which under Article 162(2)(b) of the [Constitution](#) of Kenya 2010 is the only Court mandated to determine issues of ownership, use and occupation of land.
29. I therefore find that the issues raised in the Notice of Motion dated 12th April, 2013 are *Res Judicata*. As such the said application is hereby struck out.
30. This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 17TH DAY OF MAY, 2024

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MAUREEN A. ODERO

JUDGE

