



**Nyamosi v Orango & 2 others (Probate & Administration Appeal
E002 of 2023) [2024] KEHC 5806 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION APPEAL E002 OF 2023**

WA OKWANY, J

MAY 2, 2024

BETWEEN

ROBERT ONKANGI NYAMOSI APPELLANT

AND

ANTHONY NYAMATO ORANGO 1ST RESPONDENT

ALBERT BOSIRE MOTURI 2ND RESPONDENT

ARERI ABUGA JUSTINE 3RD RESPONDENT

*(Being an Appeal from the Ruling of Hon. W.C. Waswa - SRM
dated and delivered on 13th March 2023 in the original Nyamira
Chief Magistrate's Court Succession Cause No. E034 OF 2020)*

JUDGMENT

Introduction

1. Bichage Moseti (hereinafter "the Deceased") died intestate on 24th June 1987. His Estate comprised of Land parcel L.R. No. West Mugirango/Siamani/2080 measuring 2.895Ha. Grant of Letters of Administration were issued to the deceased's wife Sabina Kerubo and confirmed by the High Court of Kenya at Kisii in 1988 when the estate was distributed to the deceased's beneficiaries after which the succession file was closed.
2. The Appellant herein however instituted fresh succession proceedings wherein he was appointed as the administrator of the deceased's estate. He listed L.R. No. West Mugirango/Siamani/1477 (hereinafter "the Suit Land") as the only asset of the said Estate. The fresh grant was subsequently confirmed. The Respondents however objected to the distribution of the Estate on the grounds that they were left out of the succession cause despite the fact that they are Interested Parties as bonafide purchasers of the



subject land. They claimed that the said land was already subdivided a long time ago when the widow carried out succession over the deceased's Estate.

3. The Respondents contended that the suit land had already been distributed, sold and subdivided to other buyers. They further argued that the proceedings were res Judicata.
4. On 13th March 2023 the trial court delivered a Ruling in which it dismissed the petition and vacated all the previous orders on the basis that the suit was of Res Judicata. The Appellant was dissatisfied with the trial court's decision and instituted the present appeal.

The Appeal

5. The Appellant listed the following grounds of Appeal in the Memorandum of Appeal dated 11th April 2023: -
 1. The learned trial magistrate erred in law and fact in relying on the affidavit of the land registrar without giving the Appellant an opportunity to cross-examine the same.
 2. The learned trial magistrate erred in law and fact in giving the Land Registrar opportunity as if he was a party to the cause.
 3. The learned trial magistrate erred in law and fact in dismissing the entire cause without assigning any reason.
 4. The learned trial magistrate erred in law and fact by misapprehending the doctrine of Res Judicata.
 5. That the learned trial magistrate erred in law and fact in dismissing a genuine claim without considering that the land parcels and the succession by the objectors were different.
6. The Appellant seeks order to set aside or vary the trial court's decision and further, that the Succession Cause before the lower court be allowed to proceed.
7. The Appeal was canvassed by written submissions which I have considered. The gist of the Appeal is whether the trial court arrived at the correct finding in holding that succession case filed by the Appellant was res judicata.
8. The duty of the first appellate court was explained in the case of Kenya Ports Authority v. Kusthon (Kenya) Limited 2000 2EA 212 where the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
9. The Appellant submitted that the Respondents/Protestors misled the court into believing that the deceased (Moseti Bichage) had only one piece of land being No. 2080 yet he had other parcels of land as shown in the copies of mutation forms presented before the trial court. He also submitted that subdivisions 1564 and 1565 emanated from 1472. It was further submitted that the two parcels of land in contention (1477 & 2080) were two different properties and that the trial court was not justified in upholding the protest.
10. The Respondents, on their part, submitted that the court lacked jurisdiction to hear the matter on grounds of Res Judicata. Reference was made to Section 7 of the [Civil Procedure Act](#) and [Re Estate](#)



of the Late Ishamel Muchiri Nkinyangi (deceased) 2021 eKLR where the doctrine of res judicata was discussed.

11. It was submitted that the Land Registrar presented documents which showed that land parcel No. 1477 was closed on subdivision.
12. The court will, in determining this Appeal, be careful not to delve into issues of the subdivision and ownership of the parcels of land for want of jurisdiction in land matters. The issue of jurisdiction was explained in Joseph Ojwang' Oundo v. National Environment Management Authority & 8 Others [2015] eKLR, where the court held as follows:-

“...it is apparent that the ELC has exclusive jurisdiction of the environment and land matters viz a viz other superior courts created by the constitution...”

13. The scope of this court's determination will therefore be limited to matters of succession and whether the same was already heard and determined by a court of competent jurisdiction. In Re Estate of Julius Ndubi Javan (Deceased) (2018) eKLR the court held that: -

“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 prima facie valid should be determined before confirmation.”

14. The doctrine of Res Judicata is provided for under Section 7 of the Civil Procedure Act which states as follows: -

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.

15. In Henderson v. Henderson (1843) 67 ER 313, the court held as follows on the doctrine of Res Judicata:-

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the 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 litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

16. The parameters for determining whether a matter is Res Judicata were outlined by the Court of Appeal in Nicholas Njeru v. Attorney General & 8 others [2013] eKLR in which they referred to the decision in Reference No. 1 of 2007, James Katabazi and 21 Others -v- The Attorney General of the Republic of Uganda, EACJ where the Court listed the parameters of the doctrine as follows: -



- i. the matter must be ‘directly and substantially’ in issue in the two suits;
 - ii. the parties must be the same or parties under whom any of them claim, litigating under the same title; and
 - iii. The matter must have been finally decided in the previous suit (See *Uhuru Highway Development Ltd. v. Central Bank & 2 Others* – Civil Appeal No. 36 of 1996).
17. The record shows that Succession Cause No. 41 of 1988 was filed at Kisii High Court in respect to the Estate of Bichage Moseti. In the said Succession cause, Grant of Letters of Administration intestate dated 8th August 1988 were issued to the deceased’s widow Sabina Kerubo who is now also deceased. The said Grant related to land parcel No. L.R. No. West Mugirango/Siamani/2080 as the only asset of the deceased.
 18. The present succession proceedings, on the other hand, relate to the estate of the same deceased, Bichage Moseti, but are in respect to Land Parcel L.R. No. West Mugirango/Siamani/1477. I find that the first parameter of the doctrine of res judicata is fulfilled as the matters in question in the two succession causes are directly and substantially the same since they relate to the estate of the same deceased person.
 19. This Court however notes that it was not clear if the deceased owned the various parcels of land as claimed by the Appellant. It was also not clear why all the properties were not listed in the original succession cause filed by his late wife Sabina Kerubo. My humble view is that even assuming that the deceased owned other properties apart from the properties listed in the original succession cause, the proper approach to be taken by the Appellant should have been to reopen the earlier succession cause and seek a rectification of the grant therein so as to include the other properties instead of filing a fresh succession cause.
 20. I further find that the Appellant’s claim that the properties in question related to different parcels of land and were not a subdivision of 1477 but of 2080, only raises questions of property ownership. As I have already stated in this judgment, the succession court lacks the jurisdiction to determine if LR Nos. 1477 and 2080 were two different parcels or if there was a subdivision of a separate parcel other than 1477. This court further lacks the jurisdiction to determine if there was transfer of ownership to the Respondents. It my finding that such an exercise falls outside the purview of the Probate Court’ jurisdiction. In re Estate of Njagi Njeru (Deceased) [2018] eKLR the court rendered itself on the mandate of ELC as follows:-

“This resolution of that question will in addition, involve application of the law on title to land, and the applicant’s summons therefore goes beyond being merely a claim of succession to the deceased property. It is notable in this regard that disputes primarily concerning ownership of land title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of *the Constitution*, and Section 13(1) and (2) of the Environmental and Land Court Act.”
 21. Having found that this Court lacks the jurisdiction to determine the issue of subdivision and ownership of land and having found that the Appellant should have filed his application for rectification of grant in the original succession cause, I find that this appeal is not merited and I therefore dismiss it with no orders as to costs.
 22. Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA
MICROSOFT TEAMS THIS 2ND DAY OF MAY 2024.**

W. A. OKWANY

JUDGE

