



In the Matter of the Estate of Hannah Wairimu Njuguna (Deceased) (Succession Cause 2629 of 2014) [2024] KEHC 12495 (KLR) (Family) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2629 OF 2014
HK CHEMITEI, J
OCTOBER 16, 2024
IN THE MATTER OF THE ESTATE OF HANNAH WAIRIMU NJUGUNA (DECEASED)**

BETWEEN

MARGARET WANJIRU THUO APPLICANT

AND

ROSE NYAMBURA NJUGUNA 1ST RESPONDENT

PAUL EDWARD NJUGUNA 2ND RESPONDENT

RULING

1. This ruling relates to the application dated March 20, 2023 filed by the Applicant, Margaret Wanjiru Thuo, seeking for orders that:-
 - (a) Spent.
 - (b) Margaret Wanjiru Thuo be enjoined in these proceedings as a beneficiary/purchaser/interested party.
 - (c) The grant of letters of administration and the certificate of confirmation of grant issued to Rose Nyambura Njuguna And Paul Edward C. Njuguna be revoked.
 - (d) This honourable court do issue order of stay of the transfer of L. R. Ruiru/Mugutha Block 1/T.3817 and a preservation of the *status quo* pending the hearing and determination of this application.
2. The application is supported by affidavit sworn by Margaret Wanjiru Thuo on March 20, 2023. She avers *inter alia* that her late husband, Henry Kimani Michino – prior to his demise on May 1, 2009, purchased L. R. Ruiru/Mugutha Block 1/T.3817 from the deceased. The Applicant and the deceased



- had obtained consent, dated November 19, 2008, to transfer the land to her from the Land Control Board and prior to the deceased's demise, she had signed a transfer in favour of the Applicant.
3. That Nyakinyua Investments Limited also issued a clearance letter to this effect dated March 26, 2021. The deceased gave the Applicant the original title deed for the land and she has it in her possession. She lives on the land with her family, has developed it and her deceased son, Dickson Michino Kimani, is buried on this land.
 4. The Applicant therefore seeks to join the suit as a beneficiary of the deceased's estate so that she can complete the transfer of the land to herself.
 5. She averred that the 1st Respondent, in the application dated January 16, 2023, was misleading the court by failing to disclose that some of the properties listed thereon were sold by the deceased to third parties and the prayer for the lands registrar to transfer L. R. Ruiru/Mugutha Block 1/T.3817 without the production of the original title deed is an act of bad faith since she knows that the Applicant has the original title deed.
 6. The application is opposed vide notice of preliminary objection dated April 14, 2023 based on the grounds that:
 - a. The summons for revocation of grant and to be enjoined as beneficiaries/interested parties dated March 20, 2023 is *res judicata*.
 - b. The impugned application is misconceived, ill – advised and in contravention of the rules of natural justice and fair trial.
 7. The notice of preliminary objection is supported by affidavit sworn by the 2nd Respondent. He avers, *inter alia*, that the issues raised in the summons for revocation of grant were canvassed in Thika Chief Magistrates Court MCL & E No. 2 of 2019 and Thika Environment and Land Court Appeal No. E076 of 2021. The Applicant lost in the trial court where the court found that she had not proved her purchaser's interest in L. R. Ruiru/Mugutha Block 1/T.3817.
 8. In response to the notice of preliminary objection dated April 14, 2023, the Applicant filed grounds of opposition dated September 6, 2023; whose grounds are that:
 - i. On the issue of *res judicata*, the Respondent should demonstrate when the same issues raised in current application were dealt with and should supply a copy of the court decision.
 - ii. The Respondent has not filed submissions in the preliminary objection and if filed we have never been served with the same to enable us respond.
 - iii. On the issue of the application being ill advised is in contravention of the rules of natural justice it is the Respondent to demonstrate how it is ill advised and against natural justice
 - iv. The preliminary objection is ill advised and seeks to deny the Applicant a chance to be heard and for justice to prevail.
 9. The Applicant has filed submissions on the notice of preliminary objection dated April 14, 2023. The submissions are dated March 11, 2024. She has placed reliance on the following:-
 - i. *In re Estate of Nchogu Sagana (Deceased)* [2021] eKLR where the court stated, "A party seeking to rely on the doctrine of *res judicata* to bar a suit from being heard must prove each of the following elements:
 - a. The suit or issue was directly and substantially in issue in the former suit;



- b. The former suit was between the same parties or between the same parties under whom they or any of them claim;
 - c. The parties were litigating under the same title in the former suit; and
 - d. The court that formally heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
- ii. *In re estate of Pauline Muthoni Nyaga (Deceased)* [2019] eKLR where the court stated, “As stated in the case of *Mukisa Biscuits* cited by the Applicant, a preliminary objection must be clear and have the potential of determining the case in a persuasive decision by Justice Musyoka in *AKN-v- JNM* (2014) eKLR it was stated:
- “This court is of the considered view that the issues raised in the preliminary objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law... The preliminary objection is thus not sustainable. A party who raises a preliminary objection, must do so only on a pure point of law and nothing else.”
- The preliminary objection raised by the Respondent is not based on a pure point of law. It is based on disputed facts. It is not a pure point of law and thus does not meet the threshold for a preliminary objection.”
10. The Respondents have filed submissions on the notice of preliminary objection dated April 14, 2023. The submissions are dated August 31, 2023. They have placed reliance on the following:
- i. Section 7 of the *Civil Procedure Act* which provides;

" 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.”
 - ii. *Independent Electoral & Boundaries Commission -vs- Maina Kiai & 5 Others* (2017) eKLR where the court stated,

" The rule or doctrine of *res judicata* served the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic common – sensical 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 favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
11. The parties have not filed submissions on the application dated March 20, 2023.



Analysis and Determination

12. I have gone through the application, the notice of preliminary objection, the grounds of opposition and the rival submissions filed by the parties extensively.
13. The law on notices of preliminary objection was well discussed In The East African Court of Justice at Arusha First Instance Division: Reference No. 8 of 2017: *Pontrilas Investments Limited Versus Central Bank Of Kenya & The Attorney General of The Republic of Kenya* where it was stated as follows:
 - “23. Having carefully considered the parties’ submissions, it is the considered view of the court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the court confirms that what is before it, is indeed a preliminary objection point of law that would be properly determined as a preliminary objection.
 24. whereas the matter under consideration was raised and argued by all the parties as a preliminary objection, the court is alive to the importance of proper procedure in the judicial process.
 25. In *Attorney General of the Republic of Kenya vs Independent Medical Legal Unit (supra)*, the Appellate Division of this Court held:

“The improper raising of points by way of preliminary objections does nothing on occasion confuse the issues. The court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like.”
 26. This point was underscored in *The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa*, Appeal No. 7 of 2015 where the court cited with approval the following exposition in *Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696 (per Newbold, P):

“A Preliminary Objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”
 27. The question of what would constitute a proper preliminary objection was further addressed in *Attorney General of Tanzania vs African Network for Animal Welfare (ANAW)* EACJ Appeal No. 3 of 2011, where the Appellate Division of this court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and



facts, the production of evidence and assessment of testimony it ‘should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross – examined, and a finding of fact then made by the Court.”

14. In light of the foregoing, I do not see how the application herein is *res judicata* or at all. There is no evidence of such and even if there was then it will mean that this court would have to dig into such evidence rendering the preliminary objection a nullity for the simple fact that for a preliminary objection to stand one need not search for any factual evidence to support the same.
15. In that case the recourse now is to consider the application. I have looked at the annexures to the application which the Respondent has been unable to controvert. It is not disputed that the Applicants husband purchased the parcel of land from the deceased herein. He then proceeded to develop the same. Thereafter her husband obtained consents from the deceased.
16. The consents from the land control board together with the transfer forms duly signed by the deceased are uncontroverted. The only thing that remained was a formal procedure of presenting the documents for registration.
17. On this score, I find that the application is meritorious. The Applicant has developed the land including burying her son on the same. There was no objection from the Respondents.
18. The issues of a case at the Environment and Land court at Thika for now does not in my view affect these proceedings. To the extent of the documentary evidence before this court I find that there is merit in the application. This of course does not preclude the parties from litigating in other forums.
19. On the issue of revoking the grant I do not think the same is feasible for now. There is no evidence that the Respondents have failed to sign transfer forms in order to transfer the parcel to the Applicant and therefore necessitating any sanction from this court.
20. Consequently, the application is allowed as hereunder:-
 - (a) The Applicant Margaret Wanjiru Thuo is hereby enjoined in the proceedings herein and a beneficiary to the estate of the late Hannah Wairimu Njuguna.
 - (b) Land parcel number Ruiru/Mugutha Block 1/T.3817 be transferred by way of transmission by the administrators herein to the Applicant and the grant herein be rectified accordingly.
 - (c) Pending the exercise of (b) above there be status quo preserving the aforementioned parcel of land.
 - (d) Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 16TH DAY OF OCTOBER 2024.

H K CHEMITEI

JUDGE

