



**Kamau v Muhia & 3 others (Miscellaneous Application  
20 of 2019) [2023] KEHC 18854 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18854 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION 20 OF 2019**

**PM MULWA, J  
JUNE 15, 2023**

**BETWEEN**

**GATHUKU MWANGI KAMAU ..... APPLICANT**

**AND**

**HARRISON GATHUKU MUHIA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH PETER KAMONDE ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR (KIAMBU LANDS OFFICE ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By an application dated 31<sup>st</sup> January 2022, the Applicant Gathuku Mwangi Kamau sought temporary injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves or through their employees or assigns accessing, erecting structures, remaining, destroying or otherwise dealing with the suit property. And the OCS Kimende Police Station and the County Commissioner Lari- Sub County to ensure compliance.
2. In the affidavit in support sworn on 31<sup>st</sup> January 2022, the applicant depones as to his objection in removing the caution he lodged against Lari/Magina /194 and that the removal orders were issued ex-parte. He contends that the respondents have erected structures on the land.
3. In opposing the application Jackson Mburu Kamande the legal representative of the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 19<sup>th</sup> December 2022, together with a Preliminary Objection. The grounds for the preliminary objection are:
  - i. This Honourable Court, as competently constituted, lacks jurisdiction to hear the Originating Summons.



- ii. The application is an abuse of the court process
  - iii. The application is fatally defective and cannot stand as it offends mandatory provisions of the law.
  - iv. The application dated 31<sup>st</sup> January 2022 is not justiciable
  - v. The jurisdiction of the court is not invoked at all.
  - vi. The orders sought by the applicant cannot be granted.
4. The gist of the replying affidavit and the grounds of opposition are that the court orders of 23<sup>rd</sup> May 2019 have been complied with and the land is subdivided and sold to third parties. The court is functus officio. And that the applicant Gathuku lacks the legal right to the ownership of the property Lari/Magina/194 as the court in its ruling found the applicant was not a beneficiary to the estate of the deceased, and the application is therefore res- judicata.
  5. By the directions of the court the preliminary objection was to be heard first and was to be canvassed by way of written submissions. Only the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed written submissions on 7<sup>th</sup> March 2022.
  6. Counsel submits that the applicant had filed a similar suit in Nairobi which has been determined and thus the court is functus officio. That court orders cannot be issued in vain. According to counsel, this court lacks jurisdiction as the issue of ownership to the suit property was determined in 2018, and if the applicant was aggrieved by the said ruling he ought to have filed an appeal as opposed to the current application.
  7. Counsel urged the court to find the application is against the rule of finality and pleaded with the court to strike out the same for being incompetent

### **Analysis and determination**

8. The gist of the matter is that the applicant herein Gathuku Mwangi instituted a claim over Lari/Magina 194 for adverse possession. The suit was dismissed for want of prosecution. He also filed Nairobi Succession Cause No. 2775 of 2004 seeking revocation of a grant issued in Kiambu SPMCC No. 113 of 2002 and the court in its ruling dated 25<sup>th</sup> September 2018, dismissed the application and held that Gathuku was not entitled to the inheritance of the deceased estate as his mother had no claim in the deceased estate. The court distributed the estate of the deceased as per the Kikuyu customary law.
9. The issues for the court to determine are:
  - i. Whether the applicant has locus standi?
  - ii. whether the preliminary objection is merited.

### **Locus standi**

10. The applicant brought the current application seeking temporary injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves or through their employees or assigns accessing, erecting structures, remaining to destroy and/ or dealing with the Lari/Magina/194.
11. I have perused the judgment of Justice Musyoka in Nairobi Succession Cause No. 2775 of 2004 delivered in September 2018, where he held that the applicant Gathuku was not entitled under



customary law to the inheritance of the property of his maternal grandmother. It is evident that the applicant did not prefer an appeal but filed the current application.

12. The application was opposed to being res- judicata and thus the orders of the court were complied with and the property sub- divided.
13. In the case of *Law Society of Kenya v Commissioner of Land & Others* - Nakuru H.CCC No.464 of 2000 the court stated that

“’Locus Standi’ signifies a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a court of law.”
14. The applicant’s claim for adverse possession over the suit property was dismissed for want of prosecution. His claim on beneficial interest was also determined by the court, where it was held that he was not entitled to the inheritance of Lari/Magina 194.
15. From the above this court finds he lacks locus standi to bring the current application as he has no legal claim over the deceased estate.

### **Whether the suit is res judicata**

16. The doctrine of res judicata is set out under section 7 of the *Civil Procedure Act* 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 can 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.”
17. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked, that is;
  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
18. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent the matter as filed is res judicata as the issue of ownership of the suit property Lari/Magina 194 has already been settled by a court of competent jurisdiction. The current application relates to the previous suits filed.
19. The applicant filed an application for revocation of the grant of the estate of the deceased on the basis that he was not involved in the process of obtaining the grant. The court has pronounced itself on the issue of ownership and inheritance of the deceased estate, the 1<sup>st</sup> and 2<sup>nd</sup> respondents proceeded to apply to this court for the removal of caution which was granted. They submit that in compliance with the judgment in NRB Case No. 2775 of 2004 the property in dispute was subdivided and sold out.



20. It is trite law that a court without jurisdiction cannot hear and determine issues, thus this court finds that the issue of ownership to the suit property has been determined by a court of competent jurisdiction which held that the applicant, Mr. Gathuku is not entitled to a share of the suit property. It therefore follows that the applicant lacks the locus standi to bring the current application.
21. The applicant claimed both adverse possession and beneficial interest in NRB ELC No. 503 of 2009 which was dismissed. The sole purpose of filing the two suits was to acquire the land.
22. The move by the applicant is gambling between the courts to see where favour would locate him. Having found the applicant lacks the locus standi to bring the instant application, and the issue of interest in the deceased estate having been determined by a court of competent jurisdiction, I find the current application is res judicata.
23. It is trite law that litigation must come to an end. The court must be vigilant not to entertain litigants evading the doctrine of res judicata by bringing and introducing new causes of action to defeat the cause of justice.
24. In the upshot, I find the preliminary objection as filed is merited. The applicant lacked the locus standi to file the Notice of Motion application dated 31<sup>st</sup> January 2022 which I hereby strick out with costs.

Orders accordingly

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

**Mr. Kinyua – Court Assistant**

**N/A for Applicant**

**Mr. Jaoko for 1<sup>st</sup> & 2<sup>nd</sup> Respondents**

**N/A for 3<sup>rd</sup> & 4<sup>th</sup> Respondents**

