



**Munyinyi & another v Munyinyi & another (Miscellaneous Application
99 of 2015) [2023] KEHC 19676 (KLR) (Family) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION 99 OF 2015**

MA ODERO, J

JUNE 23, 2023

BETWEEN

JUDY WAIRIMU MUNYINYI 1ST APPLICANT

MORRIS KUNG’U MUNYINYI 2ND APPLICANT

AND

ELIZABETH NYARIARA MUNYINYI 1ST RESPONDENT

GLENWOODS GARDENS LIMITED 2ND RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated November 15, 2015 by which Judy Wairimu Munyinyi (the 2nd applicant seeks the following orders:-

- “1. This Honourable court be pleased to issue a declaration that Major (Rtd) David Karanja Karau is liable for the decretal sum herein as surety pursuant to section 92 of the *Civil Procedure Act*, the consent dated August 7, 2015, court order dated October 23, 2019 and decree dated December 13, 2019;
2. Major (Rtd) David Karanja Karau be ordered to pay the decretal sum being the sum of Kshs.21,000,000 plus interest from the expiry of the completion period until payment in full and in failure thereof execution to issue;
3. Costs of this application be provided for; and
4. Any other relief that this honourable court may deem fit grant.”



2. The Application was premised upon section 1A, 1B, 3, 3A, 30, 34(1) and 92 of the *Civil Procedure Act* and all other enabling provisions of the law and was supported by the Affidavit of the 2nd respondent.
3. The third respondent Major (rtd) David Karanja Karau opposed the application through the Grounds of Opposition dated January 27, 2023. The application was canvassed by way of written submissions. The applicants filed the written submissions dated March 1, 2023 whilst the 3rd respondent relied upon his submissions dated March 2, 2023.

Background

4. This matter relates to the estate of the late Moses Memia Munyinyi (hereinafter ‘the Deceased’) who died intestate on 4th June 1992. A copy of the Death Certificate Serial No. 45831 is annexed to the Petition for Grant of letter of Administration Intestate.
5. The Deceased was survived by the following persons:
 - (a) Elizabeth Nyariara Munyinyi - Widow
 - (b) Gitagia Munyinyi - Son
 - (c) Kristina Nyakio Munyinyi - Daughter
6. The estate of the Deceased comprised of only one property being LR No. Kiambaa/Ruaka 1674 (the ‘suit property’)
7. Following the demise of the Deceased letters of Administration Intestate were issued to the Widow Elizabeth Nyariara Munyinyi in Kiambu Succession Cause No. 654 of 1994.
8. Following confirmation of the Grant in favour of the 1st respondent the suit property was on April 17, 2012 transferred into the name of the Widow as Administrator of the estate. Thereafter on February 6, 2015, the 1st respondent transferred the suit property to Glenwoods Gardens Limited (the 2nd respondent herein)
9. Sometime in 2015 the applicants herein claiming as children of the Deceased filed a summons seeking to revoke the Grant issued to the 1st respondent on grounds that the same was obtained fraudulently by concealing of material facts.
10. The summons for revocation of Grant was compromised by way of a consent entered into by the parties dated August 7, 2015. The said consent was duly adopted by the court on October 12, 2015. The said consent provided inter alia as follows:
 - “ 1) That Succession Cause No. 654/94 at Kiambu Law Courts in regard to the Estate of Moses Memia Munyinyi (deceased) be and is hereby transferred to the High Court of Kenya at Nairobi Law Courts Family Division forthwith.
 - 2) That the interested party/2nd respondent be and is hereby ordered to transfer to Judy Wairimu Munyinyi, Morris Kung’u Munyi and Florence Nyakio Nduranu (hereinafter referred to as the Beneficiaries) each a three (3) bedroom apartment (hereinafter Apartments) upon completion of the project which is estimated to be within thirty six (36) months from date of recording this consent in court, hereinafter referred to as date of the consent.
 - 3) That the applicants have been shown the Apartments building Plans and already identified the above mentioned Apartments as Apartment No. 1-4, 1-5



and 1-6 on the property Land Title No. Kiambaa/Ruaka/674 whereof the 2nd respondent is the current registered proprietor.

- 4) That the said Apartments will conform to the Building Plans shown and given to the applicants before the date of this Consent.
- 5) That each of the applicants/Beneficiaries shall execute Agreements with the 2nd respondent in respect of the Apartments within thirty (30) days from the date of the consent.
- 6) That on or before the completion date, the 2nd respondent shall execute relevant transfer documents or long-term leases in favour of each the Beneficiaries for their respective Apartments and grant each vacant possession of the same before the expiry of the period referred to in Clause 2 above. The 2nd respondent shall bear all transactional costs including stamp duty and any other legal charges payable to effect the transfer of the said Apartments to the beneficiaries on or before completion of the project.
- 7) That the 2nd respondent will also pay a sum of Kenya Shillings Nine Million (Kshs.9,000,000) (net of all taxes) to the Beneficiaries as follows:-
 - (a) A sum of Kenya Shillings Three Million (Kshs.3,000,000.00) to be paid on or before 30th September 2015.
 - (b) A sum of Kenya Shillings Three Million (Kshs.3,000,000.00) to be paid on or before 23rd December 2015;
 - (c) A sum of Kenya Shillings Three Million (Kshs.3,000,000.00) to be paid on or before 25th February 2016.
- 8) That in default of compliance of obligations in paragraphs 2-6 within the aforesaid completion timeframe for whatever reason, the 2nd respondent undertakes to pay the applicants/Beneficiaries on demand, a sum of cash equivalent to the price monies for the said apartments, which shall be an aggregate sum of Kenya Shillings Twenty One Million (Kshs.21,000,000.00/=) plus interest from the expiry of the completion period in paragraph 2 above until payment in full. The Parties agrees that interest rate shall be KBRR rate published by the Central bank of Kenya as at the completion date hereof plus ten per cent (10%).
- 9) That the 2nd respondent has procured its director, Major (Rtd) David Karau to a personal guarantee to the applicants and or the Beneficiaries guaranteeing the 2nd respondent's due performance of its obligations in paragraphs 2-10 above and undertaking to pay the applicants/Beneficiaries and applicant's Advocates Kshs.21,000,000.00/= and Kshs.800,000,000/= respectively (net of all taxes) on demand in the event the 2nd respondent's default on the obligations set out at paragraphs 2-10 herein.
- 10) That upon recording of this consent in Court, the two cases detailed in (8) hereinabove be marked as fully settled and the applicants/Beneficiaries hereby declare that they have no further claims against the respondents herein in respect of the said land parcel Kiambaa/Ruaka/674.



11. The applicants aver that the 2nd respondent failed to comply with the consent within the completion period of 36 months. That the said completion period expired sometime in October 2018. That despite demand having been made the 2nd respondent declined to pay to the applicants the sum of Kshs.21 Million plus interest as specified in the consent.
12. The applicants contend that by virtue of Clause 11 of the consent the 3rd respondent Major (Rtd) David Karau was enjoined to ensure the compliance of the orders by the 2nd respondent. The applicants now contend that the 3rd respondent is liable for the decretal sum by virtue of section 92 of the [Civil Procedure Act](#), cap 21, Law of Kenya. They now seek to enforce the consent against the 3rd respondent and pray that he be ordered by this court to settle the decretal sum pursuant to the consent judgement.
13. The 3rd respondent vehemently opposed the application. Vide the Grounds of opposition dated January 27, 2023 it was asserted that the present application was a replica of the applicants previous application dated February 3, 2021 which was dismissed with costs by Hon. Justice Muchelule (as he then was) in his Ruling delivered on October 3, 2022. The 3rd respondent therefore contends that the present application is 'Res Judicata' and ought not be entertained by the court as this court cannot sit in appeal over a judgement from a court of concurrent jurisdiction.
14. The 3rd respondent further asserts that he is not a party to these proceedings as the decree was not issued against him. The 3rd respondent asserts that he is not a judgement-debtor to the claim as he did not sign the consent dated August 7, 2015.
15. The 3rd respondent concludes that the present application is a waste of judicial time and amounts to an abuse of court process. That he is being vexed and hounded for no reason. The 3rd respondent urges the court to dismiss this application with costs.

Analysis and Determination

16. I have considered the application before this court, the reply filed hereto as well as the written submissions filed by both parties. The only issue for determination is whether the present application has merit.
17. I have carefully perused the court file. I note that the applicants herein filed an application dated February 3, 2021 which sought to have the 3rd respondent committed to Civil jail for failing to comply with the terms of the consent dated October 23, 2015.
18. Vide a ruling delivered on October 3, 2022 Hon. Justice A.O. Muchelule (as he then was) stated as follows:-

“5.The 3rd respondent states correctly that the decree that was extracted following the consent order was against the 1st and 2nd respondents. It was not against him, and up to that point he was not a party to these proceedings and has no obligation to honour any of the terms of the decree. No application was made under section 34 of the [Civil Procedure Act](#) to have him settle the decree. He was not a judgement debtor to the claim.

6. Secondly, no leave was sought or obtained to join him in the execution proceedings to have him satisfy the decree, or at all.

7. But most important, the claim that the 3rd respondent had guaranteed to honour the decree which claim he has denied in the sworn affidavit in response, was not substantiated. It was not indicated how he was related to the 2nd



respondent who is the judgement debtor. He did not sign any guarantee, and the consent did not mention him.” [own emphasis]

19. In the application of 3rd February 2021 the applicants sought to have the 3rd respondent punished for his failure to comply with the terms of the consent. In the present application the applicants are seeking similar orders in that they seek to have the 2nd respondent held liable to pay the decretal sum. Clearly the current application is ‘Res Judicata’
20. The doctrine of res judicata is set out in 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 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.”
21. Therefore in order to satisfy the principle of *Res Judicata* it must be shown that:-
 - (i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.
 - (ii) The issues in dispute was directly or substantially in issue in the former suit.
 - (iii) That a court with competent jurisdiction had heard the matter and finally determined it.
21. In the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* the court of Appeal stated as follows:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigations 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 pragmatic common sensical protection against wastage of time and resources in endless rounds of litigation at the behest of intrepid Pleaders hoping by a multiplicity of suits and fora, to obtain at last outcome favourable 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 or calumny. The foundation of res judicata thus rest in the public interest for swift sure and certain justice.”
22. The applicants had sought to have the 3rd respondent held liable under the consent entered into on August 7, 2015 Hon. Justice Muchelule (as he then was) thwarted this attempt through the ruling delivered on October 3, 2022.
23. The applicants thereafter again filed this present application again seeking to have the 3rd respondent held liable under the terms of the same consent. This amounts to abuse of court process not to mention being a waste of judicial time and resources.
24. In the Ruling of October 3, 2022 the Honourable Judge made a clear finding that the 3rd respondent was not a party to these proceedings and had no obligation to honour any of the terms of the decree. Indeed the Judge stated that the 3rd respondent was NOT the judgement – debtor. The applicants have not filed any appeal to challenge the decision of Hon. Justice Muchelule.



25. In the case of *Ngugi v Kinyanjui* [1989] e KLR the Court of Appeal held as follows:

“In law, any litigation has to come to an end. Once a decision has been reached by a competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment still remains on record.” [own emphasis]

26. This court cannot sit in appeal over a decision made by a court of concurrent jurisdiction nor can this court review the decision made by a fellow High Court judge. I find that this present application is *Res Judicata*. The same is dismissed in its entirety. Costs will be met by the applicants.

DATED IN NAIROBI THIS 23RD DAY OF JUNE, 2023.

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MAUREEN A. ODERO

JUDGE

