



REPUBLIC OF KENYA



**In re Estate of Kamongo Kanyi (Deceased) (Civil Appeal 28 of 2021)
[2024] KEHC 13409 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 28 OF 2021
MA ODERO, J
NOVEMBER 4, 2024
IN THE MATTER OF THE ESTATE OF KAMONGO KANYI (DECEASED)**

BETWEEN

REUWEL KEIRU KAMONGO APPELLANT

AND

HARRISON KANYI THEURI 1ST RESPONDENT

RICHARD WAMBUGU MAKU 2ND RESPONDENT

*(An Appeal from the ruling/orders of the Principal Magistrate Court at Karatina
by Hon. A. Mwangi dated the 12th day of November 2021 in Succession Cause
No. 67 of 1999 – in the matter of the Estate of Kamongo Kanyi (Deceased))*

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 10th December 2021 by which the Appellant Reuwel Keiru Kamongo seeks the following orders:-
 - “(a) That the appeal herein be allowed and the orders of Hon. A. Mwangi issued on 12th day of November 2021 in Karatina Succession Cause No. 67 of 1999 be set aside and orders do issue that the suit before the magistrate court be determined on merits.
 - (b) That the orders issued by Hon. A. Mwangi on 12th day of November 2021 in Karatina Succession Cause No. 67 of 1999 be set aside.
 - (c) That the suit in Karatina Succession Cause No. 67 of 1999 be transferred to the Principal Magistrate Court at Mukurwe-ini for final determination and hearing.



(d) That the costs of this appeal be provided for”

2. The Respondents Harrison Kanyi Theuri and Richard Wambugu Maku opposed the appeal. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 24th April 2023 whilst the Respondents relied upon their written submissions dated 9th February 2024.

Background

3. This appeal arises from Karatina Succession Cause No. 67 of 1999: Estate of Kamongo Kanyi (Deceased). The Deceased had Passed away intestate on 28th June 1975. In that Cause, letters of Administration Intestate were on 26th April 2012 issued to the two Respondents. Thereafter a certificate of confirmation of Grant was issued to the two on 20th June 2001.
4. The Appellant Reuwel Keiru Kamongo is a brother to one Kanyi Kamongo Nahashon who had been issued with letters of Administration in respect of the same estate on 8th March 2000. However on 20th June 2001 the Court on its own motion revoked the Grant issued to Kanyi Kamongo and instead directed that the Grant issue to the two respondents who were appointed as Administrators of the estate.
5. The said Kanyi Kamongo then filed Nyeri Succession Cause No. 613 of 2001 seeking to have the Grant issued to the two respondents revoked. That matter was heard by Hon. Justice Makhandia (as he then was) who declined to revoke the Grant vide his judgement dated 26th June 2007.
6. Ten (10) years later the Appellant and his siblings filed in the Nyeri High Court a suit being ELC No. 181 of 2017 staking a claim to the property known as Land Parcel Muhito/gaturia/90. The ELC matter was transferred to Mukurweini Law Courts where it was heard as Mukurwe-ini PM ELC No. 11 of 2018. The Mukurwe-ini Court dismissed the Appellants claim.
7. The Applicant then filed at the Karatina Law Courts Succession Cause No. 67 of 1999 in respect of the same estate seeking to have the Grant issued to the two respondents revoked.
8. The Respondents filed a Notice of Preliminary Objection opposing the Summons on grounds that the matter was ‘Res Judicata’ as a similar Summons had been heard and determined by Hon. Justice Makhandia (as he then was) sitting at the Nyeri High Court vide Succession Cause No. 613 of 2001.
9. The Respondents further argued that a similar matter had been heard and determined vide Mukurweini ELC No. 119 of 2018 (formerly Nyeri HC ELC 181 of 2017)
10. Finally the Respondents argued in the lower court that the matter had been overtaken by events as the Grant had been fully executed and land Parcel Muhito/Gaturia/90 had already been subdivided into three parcels being Muhito/Gaturia/2202, 2203 and 2204.
11. The Preliminary Objection was heard at the Karatina Law Courts and the same was upheld vide a Ruling delivered by Hon. A. Mwangi Principal Magistrate on 12th November 2021.
12. Being aggrieved by this Ruling the Appellant filed the Memorandum of Appeal dated 10th December 2021 which appeal is premised upon the following grounds:-
 - “1. That the learned magistrate erred in law and fact in misapprehending the nature of the proceedings in the lower court in Succession 67 of 1999 vis-a-vis the proceedings in the High Court succession cause no. 613 of 2001.



2. That the learned magistrate erred in law and fact in misapprehending the nature of the proceedings in the lower court in Succession 67 of 1999 vis-a-vis the proceedings in the High court succession cause no. 613 of 2001 and also those in Mukurwei-ni ELC No. 11 of 2018 (Formerly Nyeri ELC No. 181 of 2017).
3. That the learned magistrate erred in law and in fact in failing to find that the Appellant was well within his rights under the law to pursue an independent stake and file the summons for revocation of the grant herein in light of the circumstances of the case.
4. That the learned magistrate erred in law and in fact in finding that the application by way of summons for revocation in the lower court suit no. Succession 67 of 1999 was res judicata without appreciating its nature, the issues raised and the remedies sought vis-a-vis the nature, remedies issues in High Court Succession Cause No. 613 of 2001 thereto.
5. That the learned magistrate erred in law and in fact in finding she had no jurisdiction to entertain the Appellants summons for revocation with costs and even proceeding to deliver judgment in the absence of the appellant and without issuing adequate notice that the same would be delivered online despite the fact that the appellants and his counsel attended open court on that day that ruling was to be delivered.
6. That the learned magistrate erred in law and fact and misdirected herself in taking into account irrelevant consideration and failed to take into account relevant consideration.
7. That the learned magistrate erred in law and in fact in finding that the matters raised in the summons for revocation of grant filed by the appellant in the lower court at Karatina Court succession cause no. 613 of 2001 and that the issues were the same.
8. That the learned magistrate erred in law and in fact in upholding the Respondent's preliminary objection of res judicata and dismissing the Appellant's case at the stage she did without affording the parties the right to be heard.
9. That the learned trial magistrate erred in law and in fact by mis-appreciating and misapplying the doctrine of Res Judicata.
10. That the learned trial magistrate erred in law and in fact by finding that the preliminary objection raised in Succession cause 67 of 1999 was based purely on points of law while that was not the case herein as it raised facts that were in dispute.
11. That the learned magistrate erred in law and in fact by failing to give due consideration to the Applicant's submissions.
12. That the Learned Magistrate erred in law by failing to appreciate that the court should aim at sustaining rather than terminating a suit and/or application and that a suit/application should only be struck out if it is so weak that it is beyond redemption and discloses no reasonable cause of action.



13. That the Learned Magistrate erred in law and fact by considering extraneous issue that were not the subject matter of the notice of preliminary objection.
14. That the Learned Magistrate erred in law and in fact in failing to exercise her discretion or at all and or exercising the discretion in the wrong manner and or failing to follow the correct principles of law on the doctrine of res judicata and or precedents cited in exercise of her discretion and hence downed her tools without considering the summons had merit.
15. That the Learned Magistrate erred in law and fact by failing to appreciate that the summons for revocation filed in the lower court at Karatina by the appellant raised issues that could only be determined by the court on merit.
16. That the Learned Magistrate erred in law and fact by striking out the appellant's suit on technicalities without giving the appellant a chance to be heard on merit.
17. That the Learned Magistrate erred in law and facts by giving an order without evaluating the issues raised in the summons for revocation filed by the appellant in Succession Cause 67 of 1999.
18. That the Learned Magistrate erred in law and facts by failing to appreciate that for a plea of res judicata to succeed, the parties concerned in both sets of proceedings must either be the same individuals or 'persons who are in law identified with those who were parties to the proceedings' which in this case they were not thus occasioning a miscarriage of justice.
19. That the Learned Magistrate erred in law and facts by failing to appreciate that the same cause of action requirement had not been satisfied in that the issues determined by the High Court in Succession Cause 613 of 2001 were not the same as those to be determined in the summons for revocation filed in the lower court in Succession Cause 67 of 1999.
20. That the Learned Magistrate erred in law and facts by failing to appreciate that there were other issues in relation to the estate herein and articulated in the summons for revocation in Succession Cause no. 67 of 1999 which were not covered by, and adjudicated upon their merits in the High Court matter Succession Cause 613 of 2001.
21. That the Learned Magistrate erred in law and facts by failing to appreciate that the same person' requirement had not been met in that Reuwel Keiru Kamongo was not a privy of Kanyi Kamongo Nahashon and the two cannot be considered as the same parties.
22. That the Learned Magistrate erred in law and facts by making and/or purporting to take conclusive findings of facts and law during an interlocutory stage.
23. That the Learned Magistrate totally erred in law and facts by failing to refer to and consider the authorities relied upon by the applicants counsel at the hearing.



24. That the Learned Magistrate totally erred in law and facts in failing to appreciate that the issue herein is a succession matter and involves members of the same family and other parties interested in the estate and therefore determinations by the honourable court should be based on amicable resolutions other than give one side what would appear to be an upper hand as this would prolong and escalate the dispute further while failing to appreciate that the primary duty of a probate court is to distribute the estate of the deceased to the rightful beneficiaries.
25. That the Learned Magistrate totally erred in law and facts in failing to appreciate that where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are contested, then automatically, the issue falls out of the ambit of a preliminary objection and thus it would be improper for a court to make a contested determination of fact within a preliminary objection and hence occasioned a miscarriage of justice in the circumstances.
26. That the Learned Magistrate totally erred in law and facts in failing to appreciate that the Court has discretion to revoke or annul the grant whether or not confirmed even on its own motion.
27. That the Learned Magistrate totally erred in law and facts when she failed to appreciate that there are facts and issues in dispute which the Court has to determine on merit and was invited to do so for instance whether the grant was made to total strangers of the estate such questions being those of facts raised that would require to be established by evidence thus occasioning a miscarriage of justice.
28. That the Learned magistrate erred in law and in fact in not finding that the summons for revocation filed by the appellant should have proceeded to be heard on merits.”

Analysis and Determination

13. I have carefully considered the grounds contained in the Memorandum of Appeal dated 10th December 2021, the Record of Appeal filed on 7th July 2022 as well as the written submissions filed by both parties.
14. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited Others*[1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.....”
15. The Appellant herein had filed in the Karatina Court, Succession Cause No. 67 of 1999. The Appellant filed under Certificate of Urgency a Summons dated 23rd July 2021 seeking to have the Grant which had been issued and confirmed in the name of the two respondents revoked.



16. In response to that Summons the Respondents filed a Replying Affidavit dated 31st August 2021. The Respondents also filed a Notice of Preliminary Objection also dated 31st August 2021 arguing that the Summons for revocation of Grant was ‘Res Judicata’. The Preliminary Objection was premised upon the following grounds:-

- “ 1. That the said Summons is res-judicata as a similar Summon was heard, determined and dismissed by Justice M.S.A Makhandia (as he then was) on 26th June 2007 in Nyeri High Court Succession Cause No. 613 of 2001 as per attached ruling.
2. That the said Summons is further res-judicata as a similar claim was heard, determined and dismissed by Honourable B.M Ochoi SPM on 19th March 2019 in Mukurwei-ini ELC No. 11 of 2018 (Formerly Nyeri HC ELC No. 181 of 2017) as per attached judgement.
3. That the Orders sought in the Summons have been overtaken by events as the grant issued in this Cause on 20th June 2001 has been fully executed, as the same was transmitted, registered and Title No. Muhito/Gaturia/90 partitioned into Title Nos Muhito/Gaturia/2202, 2203 and 2204 as per attached documents.
4. That the Summons is not only incompetent and misconceived but a good example of an abuse of the process of the court.
5.”

17. The Learned trial magistrate agreed with the Respondents and found that the Summons filed by the Appellant was in fact Res Judicata. The ruling delivered on 12th November 2021 is what has given rise to this appeal.

18. The only issue this court needs to determine is whether the learned trial magistrate erred in concluding that the summons for revocation of Grant filed by the Appellant was Res Judicata”

19. 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.”

20. 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.....”

21. In the Case of Christopher vs 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.”
22. In the case of William Koross -vs- Hezekia KiptooKomen& 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 Vs. Radha Kishan, Air1977 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.”[own emphasis]
23. In their Notice of Preliminary objection at ground (2) the Respondents contended that a similar claim had been made by the Appellant in Mukurwe-ini ELC No. 11 of 2018 (formerly Nyeri HC ELC No. 181 of 2017). That said claim had been dismissed by Hon. OchoiSenior Principal Magistrate in a judgement delivered on 19th March 2019.
24. I have perused that judgement. In that suit the Appellant claimed a share in Muhito/Gaturia/90 on the basis of a ‘customary trust”
25. In dismissing that claim the trial magistrate observed that
- “The claim by the plaintiff [the appellant herein] that the land was to be subdivided into two as customary land is distributed amongst the houses of a deceased is a matter that ought to have been addressed in appeal against the succession cause not by filing this claim”
26. In other words the trial court found that the claim before him was misplaced. It is pertinent to note that the Mukurwe-ini case was filed in the Environment and Land Court. It was not filed as a Succession Cause. In the Mukurwe-ini Court no prayer was made, entertained and/or determined relating to revocation of the Grant.
27. I therefore find that the Mukurwe-ini ELC case could not have been the basis of a finding that the Summons dated 23rd July 2021 was res judicata as the ELC case did not address the same issues, as have been raised in the present application.
28. The main grounds upon which the trial magistrate in Karatina declared the Appellants Summons to be res judicata were the proceedings in Nyeri High Court No 613 of 2001. The trial magistrate in analyzing the matter correctly considered whether each element of the principle of Res Judicata had been proved.



- (i) Did the two suits involve the same parties - the Karatina Succession Cause No 67 of 1999 involved Reuwel Keiru Kamongo [the Appellant herein] as the plaintiff whilst the Respondents were named as Harrison Kanyi Theuri and Richard Wambugu Maku (the Respondents in this matter)
29. In Nyeri Succession Cause No 613 of 2001 the parties were Kanyi Kamongo Nahashon and Harrison Kanyi Theuri and Richard Wambugu Maku as the Protestors. The Appellant therefore submits that the Nyeri case did not involve the same parties.
30. This may appear so on the face of it. However the law provides that the principle of res judicata will also apply in cases where the same parties "or parties under whom they or any of them claim" are involved.
31. The petitioner cited in the Nyeri High Court case Kanyi Kamongo Nahashon was a brother to the Appellant. He had been original Administrator of the same estate. As pointed out by the trial magistrate both the Appellant and Kanyi Kamongo Nahashon were staking a claim to the same title as sons of the Deceased i.e they had the same interest in the estate being that of beneficiaries to the estate.
32. Accordingly I find that the fact that the two cases were brought different persons in fact amounts to a difference without a distinction. Both were claiming under the same title. The Appellant and his brother were both claiming as 'beneficiaries' of the estate of the Deceased. In both cases the persons sued were the same i.e the 2 Respondents. It is therefore my finding that the two cases involved the same parties.
- (ii) Whether the matter in issue in both cases were the same – In Karatina Succession Case No. 67 of 1999 the Appellant sought to have the Grant which had been issued to the two respondents revoked. In Nyeri HC Case No. 613 of 2001 the Petitioner had filed a chamber summons dated 30th November 2001 which sought inter alia the following prayers:-
- “(1) That the letters of Administration into the Estate of Kamongo Kanyi (deceased) confirmed on 20th day of June 2001 be revoked and or annulled”[own emphasis]
33. In Karatina Succession Cause No. 67 of 1999 prayer No 4 of the Summons for revocation/annulment of Grant dated 23rd July 2021 sought the following orders
- “4 That the Grant of letters of Administration Intestate issued jointly to Harrison Kanyi Tehuri and Richard Wambugu Maku on 20th June 2001 be revoked/annulled”
34. Therefore it is clear that both cases relate to the same estate being the estate of Kamongo Kanyi. Both cases sought the same orders i.e the revocation of the confirmed Grant dated 20th June 2001 issued to the Respondents. The substantial issue in both cases was the same.
35. In dismissing the prayer for revocation of Grant Hon. Justice Makhandia (as he then was) stated as follows:-
- “Having considered the application carefully, I am of the view that it does not lie. There are no valid reasons advanced for the annulment or revocation of the Grant. The remedy of the applicant lay in an appeal and or review if at all and not in an application of the nature.....”
36. This was the decision and finding of a High Court judge. The Appellant cunningly attempted to raise the very same issues before a magistrate at the Karatina Law Courts, thereby inviting the trial court to



sit in appeal over the decision of a High Court Judge. The learned trial magistrate correctly declined that invitation.

37. Instead of moving from one court to another with the same application for revocation of Grant the Appellant ought to have filed an appeal against the decision of the Judge. I find that the trial court was correct in finding that the two cases involved the same issues or questions for determination thereby rendering the issues raised in the Karatina case Res judicata.

(iii) Was the matter fully heard and determined by a court of competent jurisdiction.

The answer is a resounding yes! The judge in the Nyeri Case delivered a well-reasoned and comprehensive judgement on 26th June 2007. The judgment was not in any way ambiguous. The High Court in Nyeri is a court of competent jurisdiction. The court gave a final decision on the matter – it declined to revoke the Grant.

38. From the foregoing I find that all the elements of the doctrine of Res Judicata are shown to have been present. The issues being raised by the Appellant in Karatina Succession Case No. 679 of 1999 were already heard and determined in Nyeri HC Case No. 613 of 2001. I find that the suit filed in the Karatina Magistrates Court was mischievous and amounted to an abuse of Court process. The matter was clearly res judicata.

39. Finally I find no merit in this appeal. The same is dismissed in its entirety. The Appellant shall pay the costs for the appeal.

DATED IN NYERI THIS 4TH DAY OF NOVEMBER 2024.

MAUREEN A. ODERO

JUDGE

