

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(FAMILY DIVISION)**

**HCFA NO E016 OF 2024**

**NICHOLA MWINGA KATUMO & 6 OTHERS.....APPELLANT**

**Versus**

**GODFREY INGALA NENGO.....RESPONDENT**

**JUDGMENT**

1. The respondent filed an application for an injunction in the Court below. The application was dated **31<sup>st</sup> March 2023**. The same was canvassed before the Hon Mbeja. In a terse ruling delivered by the learned magistrate on **29<sup>th</sup> February 2024**, the Court granted an order of injunction. The specific orders that were sought were:

**(1)** Spent;

**(2)** An interim injunction do issue restraining the legal administrators, the respondents by themselves, their servants, agents of persons/institution acting under their instructions or otherwise howsoever from harassing, interfering, disposing, alienating, taking possession of the original title deed of the land parcel no **Buni/Kisimani/250** pending the subdivision and transfer of the applicant's share of land as provided for by the confirmed grant of **2<sup>nd</sup> September 2020**;

**(3)** The legal administrators of the estate of **Katumo Gonzi Mwadzidza** be directed to issue and execute the appropriate consents, subdivisions, and transfer instruments of the land parcel no

**Buni/Kisimani/250** in favour of the applicant's share as provided for by the confirmed grant of **2<sup>nd</sup> September 2020**; and

**(4)**The costs of the application be provided for.”

2. The respondent in his supporting affidavit averred that he was a purchaser of a 2-acre portion of **Title No Buni/Kisimani/250** and that his interest was noted in the certificate of confirmation of grant, which he annexed as exhibit “**GIN-B**”. He accused the administrators of denying him access to his said land. He contended that there were indications that they intended to sell the land. I, however, note that the certificate of confirmation of grant made no mention of Godfrey Ingala Nengo. It stated that the estate would devolve in accordance with the deed of family settlement.
3. The application was opposed. The appellant filed a Notice of Preliminary Objection dated **12<sup>th</sup> June 2023** in which 6 grounds of objection were raised. It was urged that the matter was *res judicata*, that the respondent was not a beneficiary of the estate, that the succession Court had no jurisdiction to deal with issues regarding title to land, and of use and ownership thereto, that the Court below lacked jurisdiction to hear and determine the matter as the cause of action is in Rabai, Kilifi County. The appellants deprecated the conduct of the respondent as amounting to forum shopping and that it was an abuse of the process of the Court.
4. The application was canvassed by way of written submissions. From the proceedings in the Court below, in particular those of **26<sup>th</sup> July 2023**, it is

clear that both parties filed written submissions. It is thereafter that the impugned judgment, whose precis I have alluded to, was delivered.

5. The appeal was canvassed by way of written submissions. Both parties filed written submissions.
6. I have considered the record of appeal, submissions of the parties, and the impugned ruling. In my view, the issues I must consider are
  - i. Whether the matter in the Court below was *res judicata*;
  - ii. Whether the probate Court can hear disputes regarding title to land;
  - iii. Whether the Mombasa Court had territorial jurisdiction to hear the matter;
  - iv. What orders should be issued?
7. It is not disputed that the respondent filed a cause at the Mariakani Law Courts, Mariakani, against the appellants. A suit filed by the respondent was dismissed by the Hon Nelly Chepchirchir-Adalo. A careful perusal of the orders sought in the said cause shows that what the respondent sought therein was an order of specific performance of the sale he entered into with the respondents. The Court at Mariakani found that the sale was made by sellers who had no grant of representation in respect of the subject estate, amounted to intermeddling, and was thus void.
8. The order of specific performance is, in fact, what prayer 3 of the Notice of Motion dated **31<sup>st</sup> March 2023**, which was allowed by Hon. Mbeja, was seeking. I note that the date of delivery of the Hon Chepchirchir-

Adalo decision was **8<sup>th</sup> February 2023**. Clearly, the decision to file the application dated **31<sup>st</sup> March 2023** was made after the first attempt at getting the impugned orders flopped.

9. The question then is whether the matter in the court below was res judicata. Section 7 of the Civil Procedure Act states that:

**“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.”**

10. What amounts to res judicata was discussed in the case of **Kenya Commercial Bank Ltd & another v Muiri Coffee Estate Ltd & 3 others [2016] KESC 6 (KLR)**. The apex Court stated in paragraph 54 that:

**“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it**

ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

11. The Supreme Court revisited the issue of res judicata in the case of **John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)**.
12. In my view, the matter appealed against was res judicata that of Mariakani. It was between the same parties, over the same subject matter. The Mariakani Court determined the matter with finality. That being the case, the learned magistrate erred, firstly by not sufficiently considering the weight of the objection, in not determining the matter at all, and by delivering a decision that may be termed as perfunctory.
13. I must note that there is a pending appeal in the Malindi Environment and Land Court that was pending at the time the impugned ruling was delivered.
14. It is clear that the respondent is not a dependent/heir of the deceased but rather a purchaser. The issues he raises are in regard to the title to land. Such matters fall outside the jurisdiction of the Probate & Administration Court.
15. This has been stated in a plethora of decisions. In the case of **In re Estate of Kipkosgei Lagat [2025] KEHC 4301 (KLR)**, it was held that:

**“Questions on ownership of property are therefore outside the jurisdiction of this Court. This is a preserve of the Environment and Land Court (ELC) as well established under Article 165 (2)(b) of the Constitution of Kenya, 2010, and Section 13 of the Environment and Land Court Act, 2011...”**

- 16.** The respondent clearly knows this, as evidenced by his decision to seek the order of specific performance, firstly, at the Chief Magistrate Court at Mariakani, in an Environment and Land cause, and subsequently, when the suit flopped, to file an appeal at the Environment and Land Court at Malindi.
- 17.** I must note that the issue of jurisdiction is not a technicality, as Hon Mbeja appeared to be suggesting in his ruling; it goes to the heart of the matter. Without jurisdiction, he should have downed his tools. See the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**. By not putting down his tools, the learned magistrate clearly erred.
- 18.** I note that the cause of action is in Kilifi. That is where the subject property is. The Court at Mombasa had no territorial jurisdiction in any case to hear and determine the matter.
- 19.** In my view, the learned magistrate failed to properly consider the matter before him. His decision is clearly wrong. He did not consider all the matters he should have considered. His decision must therefore be disturbed.

20. The upshot of the foregoing is that the decision of the Court below dated **29<sup>th</sup> February 2024** is set aside. The same is substituted with a decision dismissing the application dated **31<sup>st</sup> March 2023**.
21. The Family Court does not ordinarily issue orders regarding costs. However, in this case, the respondent has abused the Court process by filing a multiplicity of suits. In the circumstances, I grant the appellants the costs of the appeal.
22. Orders accordingly.

**Dated and signed at Mombasa, this 6<sup>th</sup> day of March 2026. Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai**  
**JUDGE**

In the presence of:

Mr. Wafula, for the Appellant;

Mr. Onyango Ogutu, for the Respondent; and

Ms. Bancy - Court Assistant.