

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
FAMILY APPEAL NO. E018 OF 2024
IN THE MATTER OF THE ESTATE OF BETH WANJIKU
(DECEASED)

CATHERINE NJOKI KIBANDI.

.....**APPELLANT**

VERSUS

PETER KIRURI WAIRIA.....1ST

RESPONDENT

DISTRICT SURVEYOR MURANG'A.....2ND

RESPONDENT

LAND REGISTRAR MURANG'A.....3RD

RESPONDENT

(Being an Appeal from the Ruling of Hon. V. Asiyo (PM) delivered on 21st May 2024 in Thika CM Succession Cause No. 176 of 2003)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Principal Magistrate in CM Succession Cause No. 176 of 2003 whereas the court dismissed the application dated 24th November 2023 on grounds that it was *res judicata*.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-

a) The learned trial magistrate erred in fact and law as the ruling was against the weight of evidence adduced by the appellant

which facts were justified, substantive and overwhelming as provided for by the law.

b) The learned trial magistrate erred in fact and in law by failing to consider that the appellant had included the District Surveyor and Land Registrar Murang'a who were not parties in the previous application which was decided on 28th February 2023.

3. Parties put in written submissions.

Appellant's Submissions

4. The appellant submits that the parties in the application dated 28th February 2023 did not include the District Surveyor and Land Registrar Murang'a as was in the application dated 24th November 2023 therefore the application could not be said to be *res judicata*.

The 1st Respondent's Submissions

5. The 1st respondent refers to the decision **in Dokhole & Another vs Usinfecha & 5 Others (Environment and**

Land Appeal 1 of 2023) [2025] KEELC 3266 (KLR) (2 April 2025) (Judgment) and submits that the appellant had previously filed an application dated 14th March 2023 which she sought to cancel or vary the mutations on land parcel LOC.16/KIMANDI-WANYAGA/981 which upon subdivision resulted in L.R. Nos.1396 and 1397. The said application

was heard and dismissed on 23rd June 2023. The appellant then filed another application dated 25th April 2024 which was similar to the earlier application apart from the inclusion of the District Surveyor

and the Land Registrar Murang'a. The trial court in its ruling dated 21st May 2024 held that the two applications were similar, issues in both applications were identical, there was a concurrence of jurisdiction of the court and there was a final determination on record.

6. The 1st respondent submits that pursuant to the ruling dated 23rd June 2023, the appellant and her brother, Stanley Wairia, were using the court to settle scores as was illustrated by the way Stanley Wairia violently opposed the proposal made to the appellant to sell her land parcel when the court conducted a site visit on 7th September 2022.

Issue for determination

7. The main issue for determination is whether the appeal has merit.

The Law

8. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....this court must reconsider the evidence, evaluate it itself 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. In particular, this court is not bound

necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

9. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a 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 itself 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.

10. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit

12. The doctrine of *res judicata* is anchored in **Section 7 of the Civil Procedure Act**. It 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 issue has

been subsequently raised, and has been heard and finally decided by such court.

13. The Court of Appeal in **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** held:-

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That the 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.

14. From the foregoing, it is clear that for *res judicata* to suffice, a court should look at all the four corners set out

above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

15. The appellant filed application dated 28th February 2023 seeking for the orders of cancellation of title number LOC.16/KIMANDI WANYAGA/1396 and LOC.16/KIMANDI WANYAGA/1397 as the mutation process was done unilaterally by the administrator. The trial court heard the application and on 23rd June 2023 dismissed it on the grounds that the respondent had already conducted the sub division and acquired titles and interfering with the sub division would expose parties to unnecessary expenses and costs. The appellant then filed an application dated 24th November 2023 seeking for orders of cancellation of title number LOC.16/KIMANDI WANYAGA/1396 and LOC.16/KIMANDI WANYAGA/1397 as the mutation process was done unilaterally by

the respondent. Orders 2 and 3 in the said application were similar, word for word as the orders in the

application dated 28th February 2023. The only difference in the applications was that the appellant included the Land Registrar and the District Surveyor in this application as opposed to the first application. Upon perusal of the two applications, it is evident that the subject matter in both applications are similar and the parties are substantially the same. The fact that the appellant enjoined the district surveyor and the land registrar does not change the substantive prayers or the subject matter. Indeed, it is evident that the issues raised in this two applications are substantially the same as those in the earlier application. It is evident that the Chief Magistrate Court Thika, being a court of competent jurisdiction rendered its decision on 23rd June 2023 after hearing all parties in the application dated 28th February 2023 on the issues that had been brought before the 2nd magistrate in the second application.

16. I reach the conclusion that the magistrate did not err in dismissing the application dated 24th November 2023 on grounds that the application was *res judicata*.
17. I find no merit in this appeal and it is hereby dismissed.
18. There shall be no order as to costs since this is a family matter.

19. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 13TH DAY OF MARCH 2026.***

**F. MUCHEMI
JUDGE**