Mutugi v Kahoya & another (Civil Appeal 108 of 2020)
[2026] KECA 760 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 760 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 108 OF 2020

S OLE KANTAI, A ALI-ARONI & AO MUCHELULE, JJA

APRIL 24, 2026

BETWEEN

WINFRED ESTHER WANGARI MUTUGI ..... APPELLANT

AND

MARGARET WANGECHI KAHOYA ..... 1ST RESPONDENT

MARTIN KAHOYA MUTUGI ..... 2ND RESPONDENT

(Being an Appeal against the ruling and order of the Environment and Land Court at Nairobi (E. C. Cherono, J.) dated 10th July 2020 in ELC Case No. 15 of 2020)

JUDGMENT

1. The deceased, Romano Njamumo Gikunju, was the owner of several properties which included the suit property land parcel No. Mwerua/Kagio/2041. He left a widow, Esther Mutugi Njamumo, who filed a Succession Cause No. 53 of 2000 at the High Court of Kenya at Kerugoya. She obtained a grant which was confirmed on 9th January 2001, and the estate was distributed. One of the beneficiaries was the appellant, Winfred Esther Wangari Mutugi, who was ordered to have an equal share in Kerugoya Service Station Shares which was given to her and to two other beneficiaries. The appellant was the granddaughter of the deceased. This was because she was the daughter of the late Festus Mutugi Njamumo, who was the son of the deceased. In the distribution, the suit property was wholly given to Esther Romano Njamumo, the appellant's grandmother.

2. Subsequently, Esther Romano Njamumo transferred the suit property to Margaret Wangechi Kahoya, the 1st respondent, to hold in trust for her son, Martin Kahoya Mutugi (the 2nd respondent) who was then a minor. The 1st respondent had had a relationship with the appellant's father and the 2nd respondent was an issue of that relationship.

3. The transfer of the suit property to the 1st respondent incensed the appellant whose case was that her grandmother (Esther) was holding the suit property in trust for her and for the 2nd respondent. She sued her grandmother and the 1st respondent at the Ndia Division Land Disputes Tribunal in Case No. 9 of 2007. Evidence was given and it was decided that the appellant and the 2nd respondent would equally share the suit property. The award was adopted as the judgment of the court at the Resident Magistrate's Court in Baricho. The suit property was subdivided into Mwerua/ Kagio/8576 and Mwerua/Kagio/8577.

4. In the meantime, the 1st respondent went before the Environment and Land Court at Kerugoya in ELCA No. 7 of 2017 to challenge the determination and award by the Land Disputes Tribunal on the basis that the Tribunal lacked the jurisdiction to hear and determine the dispute because it related to the ownership of the suit property. The challenge was successful, and the ELC set aside the award by the Tribunal. It was ordered that the titles to the two parcels of land be cancelled and the register rectified, reverting the parcels into Mwerua/Kagio/2041, and into the name of the 1st respondent to hold in trust for the 2nd respondent.

5. The appellant's grandmother passed on. In ELC No. 15 of 2020, the appellant sued the two respondents, claiming that the 1st respondent held the suit property in trust for her and the 2nd respondent because the previous owner (her grandmother) had been registered following the succession proceedings to hold the property in trust for them in equal shares. She wanted the trust determined for her to get her share. With the suit was filed a notice of motion seeking an order of inhibition pending the hearing and determination of the suit.

6. The respondents filed a defence in opposition. With the defence was filed a notice of preliminary objection whose grounds were that, the suit was res-judicata as both the Succession Cause and ELCA No. 7 of 2017 had dealt with the issues relating to entitlement and ownership of the suit property; and, secondly, that the ELC Court lacked jurisdiction to entertain the suit as the issues raised had been dealt with in the Succession Cause and finally determined.

7. The learned E.C. Cherono J., was addressed by the parties on the preliminary objection. In a ruling rendered on 10th July 2020, it was found that the suit was res-judicata on two fronts. One, that the same parties had been before the ELCA No. 7 of 2017 following the appeal by the 1st respondent against the Land Disputes Tribunal determination; that the issue of the ownership of the suit property was directly and substantively in issue; that the issue had been finally determined and that, if the appellant was minded, she ought to have cross-appealed in the matter; and now that she had not, she could not be allowed to raise the matter in a subsequent suit as that would amount to litigating in instalments. Secondly, that the appellant, having participated in the Succession Cause as a beneficiary and having not raised the issue of trust, or that she was entitled to the suit property, she could not be allowed to raise it in the subsequent suit as the matter relating to her claim had been finally determined and was res-judicata. Reference was made to section 7 of the *Civil Procedure Act* and the decisions in Henderson -vs- Henderson (1843 – 60) All ER 378 and the IEBC -vs- Maina Kiai & 5 Others [2017] eKLR.

8. This is the decision that aggrieved the appellant and has brought her to this Court on appeal. Her grounds of appeal are as follows: -

> " 1. The learned trial judge erred in law in failing to appreciate what constitutes a Preliminary Objection.
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> 2. The learned trial judge erred in law in holding that the appellant ought to have raised a counter-appeal in ELCA NO. 7 of 2017 at Kerugoya which was on

jurisdiction by the Land Disputes Tribunal to hear and determine disputes concerning title to land, yet the appellant was not aggrieved by the said award of the Land Disputes Tribunal as it was in her favour, and which was later adopted as court's judgment.

3. The learned trial judge erred in law in mistaking an appeal for a suit, and in holding that the appellant ought to have raised all issues of the suit property in the appeal (Kerugoya ELCA NO. 7 of 2017), wrongly referred to as the former suit, and not to bring issues in installments through subsequent suits.

4. The learned trial judge erred in law in misapprehending the effect of declaring an award of the Land Disputes Tribunal as null and void for want of jurisdiction and in holding that the said finding had the effect of substantively determining the issues in dispute between the parties herein over the ownership of the suit property.

5. The learned trial judge erred in law and fact in failing to appreciate that the plaintiff's claim was based on trust on grounds that the appellant's grandmother had received the suit land number MWERUA/KAGIO/2041 on behalf of the appellant's late father, Festus Mutugi, and such a claim could not be addressed in the concluded Succession Cause and further it required evidence to be adduced to determine whether the claim based on trust was sustainable or not.

6. The learned trial judge erred in law and fact in making a finding that the 1st Respondent was given the suit property in Kerugoya Succession Cause No.53 of 2000, whereas the suit land was given to the now late Esther Romano Njamumo in the Succession Cause, who later transferred it to the 1st Respondent to hold in trust for the 2nd Respondent.

7. The learned trial judge erred in law and fact in failing to appreciate that the appellant's suit was not challenging the distribution of properties as directed in the Succession Cause, but the capacity in which Esther Romano Njamumo, the appellant's grandmother, now deceased, became the owner of the suit land number MWERUA/KAGIO/2041.

8. The findings of the learned trial judge were against the applicable legal principles and the pleadings."

9. It was sought that the impugned ruling be set aside and that the appellant's suit before the ELC be reinstated for hearing and determination.

10. When the appeal came up for hearing, learned counsel Mr. Maina appeared for the appellant while learned counsel Mr. Muriuki was present for the respondents. Counsel had filed written submissions on which they each elected to rely.

11. Learned counsel for the appellant, relying on the decisions in Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors Ltd [1969] EA 696 and Attorney General & Another -vs- Andrew Mwaura Githinji & Another [2016] eKLR, submitted that, in respect of Kerugoya ELCA No. 7 of 2017, what was in issue was whether the Land Disputes Tribunal had jurisdiction to hear and determine the question of the ownership of the suit property; and it was found that the Tribunal did not have jurisdiction. Therefore, it was argued that the question whether or not the appellant was entitled to

the suit property or half of it, on account of trust, had not been heard and determined. As regards the Succession Cause No. 53 of 2000, it was argued that the court therein had not dealt with the issue whether or not the appellant's mother had been registered as trustee and that, in any case, the court could not competently deal with the issue; secondly, that the issue whether or not there was a trust in favour of the appellant was a factual issue that could not be the subject of preliminary objection. Consequently, it was further submitted that the trial court had erred in sustaining the objection.

12. In response, the learned counsel for the respondents submitted that the suit before the trial court was barred by res-judicata as the issue of the ownership and entitlement of the said property had been determined both in the Succession Cause and in ELCA No. 7 of 2017. It was contended that the appellant ought to have raised the issue of trust in ELCA No. 7 of 2017. Secondly, that in any case, the trial court did not have jurisdiction to hear and determine the issues raised in the suit, the same having been dealt with in the Succession Cause.

13. We have reviewed the evidence and the arguments that were tendered before the trial court that formed the basis of the impugned ruling. We did this while obeying Rule 31(1) of the Court of Appeal Rules, 2022 that asks us to re-appraise the evidence and be able to come to our independent conclusions on the law and fact, and while remembering that the trial court had the advantage of seeing and hearing the witnesses who may have appeared before it (see Gitobu Imanyara & 2 Others -vs- Attorney General [2016] KECA 557 (KLR)).

14. The sole question for our determination is whether the learned Judge erred in upholding the respondents' preliminary objection on the basis that the suit was res- judicata.

15. Section 7 of the *Civil Procedure Act* states 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 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."

16. It is clear that res-judicata can only be properly raised if the issue being raised in the suit was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; that the suit was heard and finally determined; and that the court that formerly heard and determined the issue was competent to try the subsequent suit in which the issue is raised (see IEBC -vs- Maina Kiai (supra)).

17. We have no hesitation in finding that the ELC in ELCA No. 7 of 2017 did not hear and determine the question whether the appellant was beneficially entitled to the suit property on account of a trust; it was only asked to determine whether the Land Distributes Tribunal in No. 9 of 2007 had the jurisdiction to hear and determine whether the appellant was entitled to the land as trustee. It was found that the Tribunal lacked jurisdiction. The merits of the appellant's claim to the suit property were not determined by that appeal to the ELC. In other words, the ELC was telling the appellant that if she was laying claim to the suit property, she should go to a court that had jurisdiction.

18. It follows, therefore, that the learned Judge, in upholding the preliminary objection based on ELCA No. 7 of 2017, fell into error.

19. The Succession Cause was determined in 2001 when the certificate of confirmation was issued. In our considered view, now that the appellant participated in the Cause as a beneficiary and accepted to share in one property of the deceased and let her grandmother be given the suit property wholly, she

could not, after 19 years, revisit the issue of her claim to the suit property in a different court. If the distribution had aggrieved her, she had the opportunity to seek its revocation or review, or appeal the decision. In our view, she had the opportunity to lay claim to the suit property. When she did not, the opportunity was lost. Her claim to the suit property became res-judicata.

20. It was argued on behalf of the appellant that, at the time the objection was being taken at the trial court, there was no evidence produced by the respondents to show that the issue of ownership of the suit property was heard, determined and a judgment given by a competent court; that therefore, the objection was not grounded on a pure point of law but on disputed facts; and that no competent court had determined the dispute.

21. To our mind, before the 2010 Constitution, a succession court was to hear and determine all questions relating to ownership of land, over and above determining which property belonged to the estate in question and who was beneficially entitled to it. That was the position in 2001 when the Succession Cause was determined. The 2010 Constitution allocated the power to hear and determine all disputes relating to land to the Environment and Land Court under Article 162(2)(b). Before that, the High Court had unlimited jurisdiction.

22. It follows that for the reasons we have given, the issue of the appellant's claim to the suit property had been heard and determined, and therefore was res-judicata.

23. Consequently, we find no merit in the appeal and dismiss it with costs.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF APRIL 2026.

S. ole KANTAI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR