



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 29 OF 1997**

**JOHN B. MASIKA**

**WANYAMA BIKETI**

**SIMEON MASIKA**

**YOHANA MULAMA.....PLAINTIFFS**

**VERSUS**

**MULEMBE FARM LTD**

**SIMON MUSUNGU.....DEFENDANTS**

**AND**

**FRANCIS KAPA NABIBIA.....INTERESTED PARTY**

**RULING**

1. The application dated 29/6/2016 is seeking the following orders:-

1) That this Honourable Court do recognize Francis Kapa Nabibia as one of the members of Mulembe Farm Ltd.

2) That costs be provided for.

2. The application is brought under *Section 1A, 1B, 3 and 3A and 63 (E)* of the *Civil Procedure Act and Order 51 Rule (1)* of the *Civil Procedure Rules*.

3. The grounds upon which the application is made are at the foot of the application. The grounds are that one **Francis Kapa Nabibia**, now deceased, was one of the original owners of **Mulembe Farm Ltd** who held **20 acres** in the Farm, that there is evidence from the office of the Registrar of Companies to that effect, that the deceased has been replaced by 2 people who were not original members of the Farm, and that this suit was conducted without the knowledge of the deceased.

4. The 1<sup>st</sup> applicant has sworn an affidavit dated 29/6/2017 in support of the application. He depones that he and the second applicant are the Administrators of the Estate of the deceased and exhibits a Grand of Letters of Administration. He also exhibits a copy of a letter from the Assistant Registrar of Companies which states as follows:-

“**RE: MULEMBE FARM LIMITED**

**According to the Company’s annual Return last filed on January, 1970, at the Companies Registry, Francis Kapa is a shareholder in the above named company and holds 20 shares”.**

5. In the list attached to the letter the entry No. 8 reads as follows:-

**Francis Kapa ---20 shares.**

6. According to that return, the 20 shares were those held by the existing member as at the date of that return, which is not evident on the face of the return but which according to the letter exhibiting it, is sometime in January, 1970.
7. The deponent also alleges in the affidavit that the deceased did not know about this case, and that the list of members which was produced in the case does not reflect the true “*picture of the members*” as it was made by farm members who did not want the deceased to get his share of the land.
8. The deponent raises the question of where the 20 shares belonging to the deceased went and if the deceased could be replaced “without following the laid down procedure”
9. According to the applicants, as the deceased was not according to the applicants given a chance to produce the documentary evidence necessary to prove his shareholding during the hearing, they pray that he be recognized as one of the original members of the Farm.
10. The application is opposed. The 1<sup>st</sup> interested party who filed his sworn affidavit dated 24/7/2017, the 2<sup>nd</sup> defendant who filed his grounds of opposition dated 23/8/2017, some five (5) interested parties who adopt the grounds of opposition filed by the 2<sup>nd</sup> defendant vide their “grounds of opposition” dated 18/9/2017.
11. In summary the defence of the responding parties is that Members of Mulembe Farm first leased **429 acres** at a cumulative annual sum of **Kshs.7000/=** renewable from year to year, to which sum each member contributed to his ability; that membership was not pre-fixed and members could join and withdraw as they wished; that the deceased was a member but he ceased to be a member in or about the **year 1972**; that payment by members for shares purchased in terms of outright purchase of the farm was done in **1974 - 1977** and by that time the deceased was not a member; that the company settled all the **19 members** who purchased the shares between **1974 - 1977** and those members and their families have lived on the land since and the deceased and his family never settled on the land in the Farm; that the decision in **Kitale SPMCC No. 60 of 2003** found that the deceased ceased to be a member of Mulembe Farm Ltd in **1972** when the Farm was still on lease and before the other members purchased their shares in the farm; that the said decree in **SPMCC No. 60 of 2003** has never been appealed; that the deceased made an application for admission as a member of Mulembe Farm Ltd in the year **2006** in **Kitale High Court Land Case No. 58 of 2006** but the said case was dismissed by the court for want of prosecution; that the judgment in this case has lasted for 21 years with no attempts to appeal or review it; that there is no error on the face of record shown and finally, that the applicant is not in occupation of the land in the Farm even now.
12. There are no factual responses to these allegations save the applicants’ deposition in a further affidavit dated 19/9/2017 which insists that the Registrar of Companies has confirmed that the deceased was a member in the Farm and that there is no evidence that the deceased left Mulembe Farm before it was purchased.
13. The applicant also reiterates that as at the time the case was heard in the High Court the deceased “*was not aware and such lapses cannot make him lose his land*”. It is denied that the instant application is *res judicata*.
14. In my view, primary issue that arises is whether the application herein is whether the instant application *res judicata*.
15. In regard to this issue, there is evidence which has not been controverted by the applicants, that the deceased instituted **Kitale SPMCC No. 60 of 2003** in which the decision dated **8/3/2004** was issued. The decree therein, which is exhibited as “**PKM4**” read as follows:-
- (1) That the complainant failed or has no receipt to show that he paid for the purchase of land in Mulembe Farm.**
  - (2) That the complainant was a member of Mulembe Farm and left the Farm before it was bought. He left the Farm while it was still on lease in 1972.**
  - (3) That the complainant had lodged this claim in 1990 before the land dispute tribunal and this case was dismissed.**
  - (4) That therefore the claim lodged by the complainant Francis Nabibia has no ground and be dismissed.**
16. Even if the pleadings in that suit are not exhibited there clearly is evidence that the deceased has approached the court with a prayer that he be declared a member of the Mulembe Farm Limited. The fate of that claim lodged by the deceased that is, for him to be deemed a member of Mulembe Farm Ltd, was dismissed, yet it is the same order which the applicants seek in the instant application.
17. Further I agree that as urged by the 2<sup>nd</sup> respondent, the application dated 29/6/2016 does not argue that it is for a review of the judgment of this court in this matter or that there was an error on the face of the record to warrant a review of the said judgment.
18. In my view the application, not having been brought under **Order 45 of the Civil Procedure Rules**, cannot be deemed to be an application for review. The very fact that the normal grounds of review are not relied on supports this view.
19. The applicants’ insistence on the letter and Return obtained from the Registrar General is not of much use in the face of all possible vicissitudes between the year 1970 and 1977.
20. During that period members are, according to the respondent’s affidavit evidence, said to have paid for outright purchase of the farm land.
21. The applicants do not indicate the whereabouts of the deceased or present evidence that he paid for the land. In any event there is also no

evidence that, having attempted to be declared a member in the suit that was dismissed, the deceased appealed successfully against that decision.

22. The applicants urge that there is no evidence of buying back of shares, transfer of shares, non-payment of allotment/calls, order of court that shares be transferred to another member exercise of him by the company or a winding up to indicate where the deceased's 20 shares went.

23. However, **Explanation 4 in Section 7 of the Civil Procedure Act**, any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such a suit.

24. In my understanding of that explanation, it matters not that the deceased never raised the issue of by which process the shares that he had held in Mulembe Farm Limited were disposed of, and that the applicants are raising that issue for the first time in the instant application.

25. The law deems such matters as would have gone into establishing whether the deceased as matters that ought to have been raised in that first suit.

26. It should be understood that were the rule different, there may be considerable litigation in instalments thus clogging the wheels of justice which would not be in the public interest. It behoves a litigant to present all the grounds which he wishes to rely on in any proceedings lest some grounds be locked out by the law relating to res judicata.

27. In this instance, there was a previous suit on the same issue as that raised by the applicants herein, filed by the deceased himself, which suit failed on certain grounds and which was not appealed. In the case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR* the court stated as follows;

**“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”**

28. I find that the issue of the deceased's membership in Mulembe Farm Ltd was finally determined in the Subordinate court in *Kitale SPMCC No. 60 of 2003*, and that it is not argued here that the court dealing with that matter did not have jurisdiction. Also, this is not an appeal against that decision; this application is therefore the wrong starting point for the applicants if regard is, as must be the case here, taken of that suit.

29. In my view it is not permissible for the applicants to overlook an existing decision made by a court with jurisdiction in order to seek a varying decision from another court over the same issue.

30. To finally determine whether the issue raised in the application is *res judicata*, the court also needs to look into whether the issue the application raises is being raised as between the same parties in the previous litigation and whether it was dealt with by a court of competent jurisdiction.

31. **Explanation Note 6 of Section 7 of the Civil Procedure Act** states as follows:

**“Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

32. In my view as the applicants merely represent the estate of the deceased. They have now enjoined among others, the second defendant who was the defendant in the suit filed by the deceased. I find no manner in which the inclusion of other parties who were not enjoined in the previous case would nullify the defence of *res judicata* in the instant application. I find that the suit is substantially between the same parties.

33. On that point I observe that in the case of *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR*, the court cited the case of *E.T Vs Attorney General & Another (2012) eKLR* where it was held that:

**“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177* the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted *Kuloba J.*, in the case of *Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)* where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’”**

34. I agree with that decision.

35. As regards the jurisdiction of the court, I find that the subordinate court had jurisdiction to handle land matters then, as now. In addition, the respondents submitted that the application before me is not made under **Section 103 (1) of the Companies Act**.

36. The applicants have not even tried to disguise their application by coming under any other statutory provisions or cause of action. They have just reinstated the deceased's claim as it was before he died. In the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** it was stated as follows:

**“There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, *William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR*, it was stated:**

**“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 v Radha Kishan, AIR 1977 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.”**

**The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it - not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”**

37. Having regard to the cases cited and the circumstances of this case, this court therefore finds that it can not have jurisdiction in the matter, to grant the prayers as prayed as the issue had been decided earlier.

38. Finally, I wish to examine **Section 103** of the **Companies Act** which states as follows:

(1) If-

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) the cessation of membership of a person who has ceased to be a member of the company has not been entered in that register, the person affected, or the company or any member of the company, may apply to the Court for rectification of the register

(2) On hearing an application made under subsection (1), the Court shall either refuse the application or order rectification of the register and payment by the company of any damages sustained by any party affected by the error or is failure.

(3) On hearing such an application, the Court may-

(a) decide any question relating to the title of a person who is a party to the application to have the person's name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and

(b) generally decide any question that it considers should be decided in order to rectify the register.

(4) In the case of a company required by this Act to lodge a list of its members with the Registrar, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the Registrar, who shall on receipt of the notice make such adjustments to the Register as the Registrar considers appropriate.”

39. I agree with the respondents that the instant application has not been brought under the provisions of the cited section. There is no elaboration on the meaning of “recognition” of the deceased as a member of the Mulembe Farm Ltd, or in what manner the court should exercise such “recognition”. No mention is made of the company Members register in the prayers. It is incumbent upon litigant to be specific regarding the reliefs they seek in court.

For the reasons hereinabove, I find the application dated 29/6/2016 to be without merit and I hereby dismiss it with costs.

**Dated, signed and delivered at Kitale on this 6<sup>th</sup> day of February, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**6/2/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Isabellah/Picoty

Mr. Majanga holding brief for Munialo for the plaintiff

Mr. Samba for the 2<sup>nd</sup> defendant absent

Mr. Kiarie for interested party absent

Mr. Teti for 1<sup>st</sup> defendant absent

**COURT**

Ruling read in open court in the presence of counsel for the applicants and in the absence of counsel for all the other parties who had notice of the date.

**MWANGI NJOROGE**

**JUDGE**

**6/2/2018**