



**Mbugua (Suing as the Personal Representative of the Estate of Peter Mbugua Mukora) v Muoge & 6 others (Environment & Land Case E046 of 2023) [2024] KEELC 1066 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1066 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E046 OF 2023**

**J OMANGE, J  
FEBRUARY 22, 2024**

**BETWEEN**

**ANN NJERI MBUGUA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER MBUGUA MUKORA) ..... PLAINTIFF**

**AND**

**SAMUEUL MUOGE ..... 1<sup>ST</sup> DEFENDANT  
JANE NJERI ..... 2<sup>ND</sup> DEFENDANT  
RUTH WANJIRU ..... 3<sup>RD</sup> DEFENDANT  
DORCAS WAMBUI ..... 4<sup>TH</sup> DEFENDANT  
ESTHER MUKAMI (SUED JOINTLY AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF DAVID MUOGE GATHAIYA) ..... 5<sup>TH</sup> DEFENDANT  
JOHN GITARI NDAMBIRI ..... 6<sup>TH</sup> DEFENDANT  
NANCY WANGUI GITARI ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. In this application the Plaintiff who brought this suit as personal representative of the estate of Peter Mbugua Mukora sought to restrain any development from taking place on the suit property and an order of inhibition pending the hearing and determination of the suit and further an order ordering the Defendants to vacate the suit property. The Plaintiff contends that she was a beneficiary of the estate of Paul Mbugua Mukora who with the consent of his family merged his share in Dagoretti/ Mutuini/ 488 with that of ½ share of Rachel Wairimu Mbugua on the understanding that the late Rachel Wairimu Mbugua was to divide the property equally amongst the heirs of Paul Mbugua Mukora.



2. That upon the death of Paul Mbugua Mukora and Rachel Wairimu Mbugua one David Muoge Gathaiya represented herein by the 5<sup>th</sup> Defendant intentionally refused to disclose to the court that the land was held in trust for other beneficiaries. That David Muoge Gathaiya subdivided the land without consideration for other beneficiaries.
3. The Plaintiff avers that she has been evicted from the suit property rendering her, her children and grandchildren homeless. She prays that the court grants the orders sought pending the hearing and determination of the suit.
4. The Defendants on their part submitted that the pleadings have not disclosed any reasonable cause of action. And that no particulars of fraud had been given. The Respondent also averred that the issue has been the subject of several court cases and as such this matter should be dismissed. The Respondents contended that the application and entire suit is res judicata to
  - i. Nairobi ELC No 648 of 2009
  - ii. Nairobi EA Civil Appeal No 141 of 2006
  - iii. Nairobi HCC No 2141 of 1998
5. A site visit ordered by the court confirmed that the 6<sup>th</sup> and 7<sup>th</sup> Defendants are in possession of the suit property and are constructing on the same.
6. The Plaintiff's counsel in their submissions reiterated the contents of the supporting affidavit and insisted that there was a customary trust between the deceased Paul Mukora and the 1<sup>st</sup> wife Rachael Mbugua Mukora with whom they jointly owned the suit property and who was to hold the suit property in trust to be divided amongst the three households.
7. The Plaintiff submitted that she is entitled to the injunctive orders as she has established a prima facie case on the basis of a customary trust which is one of the exceptions to indefeasibility of title under section 28 (b) of the *Land Registration Act*. The Plaintiff cited the Supreme Court decision in *Isack M'inanga Kiebia -vs- Isaaya Theuri M'lintari & & another [2018]* eKLR in which the court settled the question of customary trust being an overriding interest in land.
8. She urged the court to grant conservatory orders to stop the 6<sup>th</sup> and 7<sup>th</sup> defendant from constructing commercial buildings that will affect the subject matter by transferring ownership to 3<sup>rd</sup> parties pending determination of the suit and have requested the court to evict the Defendants from the suit property to preserve the same.
9. The Plaintiff argued that she had established a prima facie case and relied on the Court of Appeal decision in *Mugo Muiru Investments Limited-vs- E W B & 2 Others (2017)* eKLR.
10. The Defendants did not file any submissions in respect of the application. Having considered the foregoing, the following are issues for the court's determination; Whether the application is res judicata and if not, whether the applicant has satisfied the requirements for issuance of a temporary injunction as in *Giella Vs Cassman Brown* case.
11. Section 6 of the *civil procedure Act* 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 the former suit between 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"



*Black's law Dictionary 10<sup>th</sup> Edition* defines res judicata as follows;

“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...”

12. In respect of the current application in considering whether the matter is Res Judicata the court is called upon to consider;
  - i. The issues in the previous suit; whether the issues are the same as in the current application and if so whether the decision addressed all the issues.
  - ii. That former suit was between the same parties or parties under whom they or any of them claim.
  - iii. and if the court that rendered the decision was of competent jurisdiction.
13. The Defendants argue that the application and plaint are addressing issues already dealt with in Nairobi ELC No 648 of 2009, Nairobi EA civil appeal no 141 of 2006 and Nairobi HCC no 2141 OF 1998 which sentiments have not been rebutted by the applicant. On the question of whether the issues in the application and plaint are the same issues as was addressed in the highlighted cases, it is appropriate to consider the issue for determination in this and the other cases. The main issue raised by the Plaintiff is that she is a beneficiary of the Estate of Paul Mukora Mbugua who jointly owned Dagoretti/ Mutuni/488 that later was subdivided into several parcel. That Rachel Mbugua was to hold the suit property in trust for the other co beneficiaries herself included by virtue of being the daughter in law to Peter Mukora.
14. She seeks to have the 6<sup>th</sup> and 7<sup>th</sup> Defendants the administrators of the estate prevented from interfering with the suit property and stop the construction that is ongoing and further they be prevented from evicting her. The issue in dispute is that of the rights of the parties in respect of Dagoretti/ Mutuni/488.
15. In the cited cases claimants who alleged to have a stake on the estate of Rachel Wairimu Mbugua had sought to revoke the letters of administration issued to the kin of the defendants on the grounds that there was a customary trust in their favour in respect of the suit property. This argument was dismissed by the High Court and affirmed in the Court of Appeal. The courts conclusively determined that the late David Muoge Gathiya was rightfully entitled to the property as the next of Kin to Rachel Wairimu Mbugua who acquired the entire property by virtue of being the joint owner with her late husband after his demise. The 6<sup>th</sup> and 7<sup>th</sup> defendants herein became administrators to the estate after David eventually passed away.
16. The Plaintiff herein was not a party in the suit but the issues raised at that time are the same issues being raised as she claims that there was a customary trust in favour of the beneficiaries of the estate of Paul Mbugua Mukora. The issue was already conclusively addressed by the Succession Court.
17. The Judgement barred any other party claiming under the household of the co-wives from raising the same issues the Applicant herein included since she was the daughter in law to one of the co-wives.
18. On the last limb on whether the parties were the same, the doctrine of Res Judicata applies if the parties are the same or are in privity with the Parties in the second suit. The Court of Appeal in the case of



*Godfrey Shimonya Peter & 3 others v Mary Anyango Ameka & another [2018]* eKLR where the court stated

“The appellants’ contention is that they were not parties in the previous suit as they were minors. Indeed, the learned Judge found that they could not sue in their own right as they were not of age. That being so it is clear that their interests were being represented by their parents, or other relatives who were parties to the suit. The orders of the Court were not just against Omumia Ingambi, who was claiming the land from his brother Andrea Salamu but against all those claiming through him, meaning all those who were residing on that plot because they were related to Omumia Ingambi one way or another.”

19. The Plaintiff’s interest was represented by the parties in the other cases which culminated in the final judgement in Civil Appeal 141 of 2006 Njeri Mbugua and another Vs Peter Kariundi Gathaiya & another. The orders issues are binding on the Plaintiff.
20. While the issue of Res Judicata would determine this matter, it is also necessary to state that there was an obvious lack of candour in the information the Plaintiff gave this court. The affidavit in support of her application is at best wanting but at worst economical with the truth. She does not give the long history of the case. Neither is she forthcoming on the facts that have transpired in this dispute which has been hard fought since 1998 when Rachel Wairimu Mbugua passed away.
21. The original protagonists are long gone. The dispute having been inherited by the heirs. Litigation must come to an end. This issue having been fully litigated upon I hereby strike out the application and suit with no orders as to costs as it arises out of a family dispute.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**Judy Omenge**

**JUDGE**

**In the presence of: -**

Mr. Otieno for Applicant

No appearance for Respondents

Steve - Court Assistant

