



**Gachago & 3 others (Suing on behalf of the Estate of Joyce Gathoni Ndirangu - Deceased) v Ruithibu (Environment & Land Case E001 of 2023) [2024] KEELC 1639 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1639 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE E001 OF 2023**

**JO OLOLA, J  
MARCH 20, 2024**

**BETWEEN**

**PRISCA NYANDIA GACHAGO ..... 1<sup>ST</sup> PLAINTIFF  
JULIET WANJA GACHUHIU ..... 2<sup>ND</sup> PLAINTIFF  
MARGARET WANGECHI GITHINJI ..... 3<sup>RD</sup> PLAINTIFF  
JOHN BATSITER MUKERE ..... 4<sup>TH</sup> PLAINTIFF  
SUING ON BEHALF OF THE ESTATE OF JOYCE GATHONI NDIRANGU -  
DECEASED**

**AND**

**TARCISIO GITHAIGA RUTHIBU ..... DEFENDANT**

**RULING**

1. By a Plaint dated 16<sup>th</sup> January 2023, the Four (4) Plaintiffs suing on behalf of the estate of Joyce Gathoni Ndirangu (Deceased) sought for Judgment against the Defendant for:
  - (a) A declaration to be issued that the Defendant holds Title No. Muhito/Mbiuini/586 as a trustee and for the benefit of the Plaintiffs;
  - (b) An order of cancellation of Title No. Muhito/Mbiuini/586;
  - (c) An order directing the County Registrar Nyeri to register the Plaintiffs as the bona fide owners of L.R No. Muhito/Mbiuini/586 and issue them with the Title Deed thereof;
  - (d) An order requiring the Defendant to immediately remove the temporary structures erected on Muhito/Mbiuini/586 and deliver vacant possession thereof to the Plaintiffs failing which an order of eviction be issued against the Defendant at his expense;



- (e) General damages for illegal interference with the suit land;
  - (f) An order of permanent injunction be issued against the Defendant, his agents, servants and employees restraining him from entering, remaining (in), developing or in any way whatsoever interfering with L.R No. Muhito/Mbiuini/586;
  - (g) Costs of this case; and
  - (h) Any further or other relief this Court may deem just and expedient to grant.
2. Those prayers arise from the Plaintiffs contention that they are the daughters of one Mukere son of Ngonde who was a paternal uncle to the Defendant and who was registered as the proprietor of the said L.R No. Muhito/Mbiuini/586 on or about 23<sup>rd</sup> January, 1959. The Plaintiffs assert that following their said father's death in 1976 and the subsequent death of their mother in 1985, the Defendant discreetly and fraudulently instituted Nyeri Senior Resident Magistrate Succession Cause No. 63 of 1986 in respect of the estate of the Plaintiff's father and proceeded to obtain Letters of Administration pursuant to which the Defendant secretly came to be registered as the proprietor of the suit property on 24<sup>th</sup> August, 1992.
  3. It is the Plaintiffs' case that they only came to learn of the Defendant's fraudulent activities in July, 2008 whereupon they proceeded to lodge a caution on the land to prevent any further dealings therewith.
  4. But in his Statement of Defence dated and filed herein on 12<sup>th</sup> April 2023, Tarcisio Githaiga Ruithibu (the Defendant) denies having unlawfully and fraudulently petitioned for Letters of Administration for the estate of Mukere s/o Ngonde. It is his case that he did so with notice and that the Plaintiffs were heard in the said succession cause and a Judgment was thereafter delivered on 12<sup>th</sup> August, 1992 and that hence this suit is *res judicata*.
  5. The Defendant admits that he was registered as proprietor of the suit property on 24<sup>th</sup> August, 1992 pursuant to the succession cause. He however denies holding the land as a trustee for the Plaintiffs and invites the Plaintiffs to strict proof.
  6. Subsequently and by a Notice of Preliminary Objection also dated and filed herein on 12<sup>th</sup> April 2023, the Defendant objected to the Plaintiffs' suit and sought to have the same struck out on the grounds that:
    - (a) The Plaintiffs' claim is *res judicata vide* the Judgment and decree dated 11<sup>th</sup> March, 1992 and order dated 12<sup>th</sup> August, 1992 in Nyeri Senior Resident Magistrate Succession Cause No. 63 of 1986;
    - (b) The Plaintiffs' claim as set out in the Plaint seeking equitable relief in the nature of a declaration of a trust of property is statutory barred (sic) as it offends Section 4(1)(e) and 20(2) of the *Limitation of Actions Act*, Cap. 22 Laws of Kenya as the claim was brought/filed well in excess of 6 years from the date the cause of action accrued on 24<sup>th</sup> August, 2022; and
    - (c) The Plaintiffs have no capacity and/or *locus standi* to file this suit.
  7. The said Preliminary Objection was disposed of by way of written submissions. I have accordingly carefully perused and considered the said submissions as well as the written authorities placed before the Court by the Learned Advocates representing the Parties.
  8. By his Notice of Preliminary Objection as filed herein, the Defendant objects to the Plaintiffs suit on account that the same is *res judicata* and that the same is time-barred by statute and hence offends



Sections 4(1)(e) and 20(2) of the Limitation of Actions Act. It is further the Defendant's case that the Plaintiffs have no capacity or *locus standi* to file this suit.

9. On the contention that the Plaintiffs have no *locus standi* or capacity to institute this suit, the Defendant submits that the Plaintiffs' deceased father died intestate. It is his case that none of the Plaintiffs are either the executors of the deceased will nor are they administrators of his estate to enable them seek the orders herein. On their part, the Plaintiffs have submitted that they have instituted the claim as beneficiaries of the suit property and not on behalf of the estate of their father.

10. As was stated in Alfred Njau & Others -vs- City Council of Nairobi (1982) KAR 229:

“The term *locus standi* means a right to appear in Court and conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in such proceedings.”

11. In that respect, I have looked at the Plaintiffs' pleadings herein and it was clear to me that the same are predicated on the very fact that they are the heirs and the children of Mukere s/o Ngonde. It has not been disputed by the Defendant that prior to his own registration as the proprietor of the suit property in 1992, the same had been registered in the name of the said Mukere s/o Ngonde.

12. It follows that the Plaintiffs have the *locus standi* to bring the claim and are not limited by the requirement to have letters of administration as they are not claiming their father's interest but their own. The contention that the Plaintiffs have no capacity to institute the suit is therefore without merit.

13. On the question as to whether the Plaintiffs' suit offends the provisions of Sections 4(1)(e) and 20(2) of the Limitation of Actions Act, the Plaintiffs have refuted the same and asserted that the said Section 20(2) of the Act is subject to Section 20(1) of the Limitation of Actions Act. At any rate, the Plaintiffs submit that the acts of fraud and fraudulent breaches of trust as raised in their claim cannot get refuge under the said Act.

14. Section 4(1)(e) of the Limitation of Actions Act, Cap. 22, provides as follows:

“4. Actions of contracts and tort and certain other actions:

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –

(a) ...

(b) ...

(c) ...

(d) ...

(e) actions including actions claiming equitable relief, for which no other period of limitation is provided by this act of any other written law.”

15. Section 20(1) and (2) of the said Act on the other hand provides thus:

“20. Actions concerning trust property;

(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –



- (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
  - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- (2) Subject to subsection (1) an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued.

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.”

16. It was the Defendant’s submission that the Plaintiff’s action is based on an equitable relief of trust and that they have pleaded at Paragraph 10 of the Plaint that the course of action arose in the year 1992. On that context, the Defendant asserts that this suit having been brought outside the six (6) years period, the same was time-barred. It was however clear to me from a reading of the both Sections 20(1) and (2) that the provisions of Subsection (2) had been subjected to those in Subsections (1).
17. A proper reading of Subsection (1) in my view removes the requirement of six (6) years where an action is brought in respect of a fraud or fraudulent breach of trust to which the trustee was privy or a Party. In the context of the matter before me, it was apparent that the Plaintiffs were asserting that they were the heirs and hence beneficial owners of their father’s estate which includes the subject parcel of land. It was the Plaintiffs’ case that unknown to them, the Defendant had proceeded in a fraudulent manner to disinherit them of their entitlement when the Defendant went on to register the suit property in his name in 1992.
18. While none of the Parties herein had submitted on the import of such an issue, it was apparent to me that this was a claim by the Plaintiffs for the suit property arising from the alleged fraud of the Defendant. The Plaintiffs have pleaded and particularized the Defendant’s alleged fraud at Paragraph 9 of the Plaint as follows:

“9. The Defendant filed the said Succession Cause discreetly and fraudulently failed to disclose to the Court that the deceased was only an uncle to the Defendant and that he (the deceased) had biological children (albeit females (sic)) who were alive and solely entitled as of right to inherit the property of their deceased father.

Particulars of fraud on the Part of the Defendant

- (a) Secretly filing the Succession Case;
- (b) Failing to disclose that the Defendants in fact existed;
- (c) Misleading the Court that he was only the exclusive heir;



- (d) Failing to procure the Plaintiffs consent to institute the Succession Case as persons with (a) higher right to succeed the deceased;
- (e) Misleading the Court that he was a son to the deceased instead of nephew;
- (f) Swearing falsely and fraudulently in support of the Letters of Administration; and
- (g) Res ipsa liquitor.”

19. In the context of such a claim Section 26 of the [Limitation of Actions Act](#) provides as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either –

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

20. From a perusal of Paragraph 11 of their Plaint, it is the Plaintiffs’ case that they discovered the fraud in July 2008. If one were to believe the Plaintiffs, that then is the time from which the period of limitation begun to run as against themselves. As it turned out, other than lodging a caution on the title of the suit property on 15<sup>th</sup> July 2008, the Plaintiffs did not take any actions to recover the land until some 15 years later when they proceeded to lodge this claim on 15<sup>th</sup> January, 2023.

21. That being the case, it was evident that this suit was time-barred. It was not barred by Sections 4(1)(e) and 20(2) of the [Limitation of Actions Act](#) cited by the Defendant but by Section 7 thereof. The said Section 7 of the [Limitation of Actions Act](#) provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims to that person.”

22. While it is my view that the finding that the suit was time barred was sufficient to conclude this matter, I think it is only fair, in case I am in error, that I deal with the last preliminary point as raised by the Defendant. That is the issue of whether or not the Plaintiffs claim as raised herein is *res judicata*. According to the Defendant an order was issued in Nyeri Senior Resident Magistrate Cause No. 63 of 1986 wherein the suit property was decreed to himself. He submits that the 2<sup>nd</sup> Plaintiff in particular was a witness in the Succession proceedings where Judgment was issued in his favour on 11<sup>th</sup> March, 1992.

23. The doctrine of res judicata is provided for under Section 7 of [Civil Procedure Act](#), Cap. 21, 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.”

24. From a perusal of the pleadings and documents filed by the Defendant, it was apparent that there was a dispute concerning who would inherit the suit property herein following the death of the first registered proprietor thereof, the said Mukere s/o Ngonde. That dispute arrived at the Nyeri Senior Resident Magistrate’s Court as Succession Cause No. 63 of 1986: In the Matter of the Estate of Mukere s/o Ngonde.
25. From a perusal of the proceedings arising from the matter, it was apparent that Margaret Wangechi Githinji (the 3<sup>rd</sup> Plaintiff herein) was the Applicant together with Francis Wachiuri and John Mukere. Tarcisio Githaiga Ruithibu (the Defendant herein) is listed as the 1<sup>st</sup> objector together with one Ngonde Githibu and Ngonde Wachiuri. At Page 5 of the proceedings, John Mukere who is listed herein with one Peter Ngumo Ndirangu as the 4<sup>th</sup> Plaintiff was one of the witnesses who testified in support of the 3<sup>rd</sup> Plaintiff’s case.
26. It was further apparent that the dispute was referred to arbitration by a Council of Elders. The Elders Award received in Court on 17<sup>th</sup> September, 1990 indicates that even though the two groups of elders disagreed somehow on the sub-division and/or inheritance of the land, their Chair, the District Officer Nyeri, agreed with the side that favoured the Defendant herein. The majority decision dated 15<sup>th</sup> August, 1990 was to the effect that the suit property be inherited solely by the 1<sup>st</sup> objector Tarcisio Githaiga Ruithibu.
27. That decision was subsequently adopted as an order of the Court on 11<sup>th</sup> March, 1992. Subsequently on 12<sup>th</sup> August 1992, the Court issued orders as follows:
  - “ 1. That a Grant of Letters of Administration are hereby confirmed as per the Judgment of this Court made on 11<sup>th</sup> March, 1992.
  2. That land parcel number Muhito/Mbiuini/586 currently registered in the name of Mukere s/o Ngonde (deceased) be now registered in the name of Tarcisio Githaiga Ruithibu absolutely; and
  3. That the costs of this application are costs in the cause.”
28. Arising from the foregoing, it was evident that the Defendant herein obtained registration as proprietor of the suit land in a succession process which included the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs herein as Parties who were litigating under the same title. In the matter herein, the Plaintiffs have added the names of Prisca Nyandia Gachago (1<sup>st</sup> Plaintiff), Juliet Wanja Gachuhiu (2<sup>nd</sup> Plaintiff) and who admit they are sisters together with Peter Ngumo Ndirangu who is shown as a joint 4<sup>th</sup> Plaintiff. It was interesting to note that despite the two names of the gentlemen appearing as the “4<sup>th</sup> Plaintiffs” the Plaintiffs contend that all of them are female and that their father had no male children and hence the reason the Defendant took advantage of them. No attempt is given to explain who the 4<sup>th</sup> Plaintiffs are.
29. As it were, it is trite law that Parties cannot evade the doctrine of *res judicata* by merely adding other Parties or causes of action in subsequent suits. There was no contention that the Court that handled the succession cause was not competent to do so. The decree issued by the Court has neither been appealed nor set aside. It follows that I am persuaded that this claim was in addition to being filed out of time, *res judicata*.



30. As the Court of Appeal stated in *The Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others* (2017) eKLR:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

31. In the premises, I am persuaded that there was no basis for this Court to entertain the Plaintiffs’ claim. The same was filed out of time and is as stated by the Defendant, *res judicata*. The same is hereby struck out with costs to the Defendant.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 20<sup>TH</sup> MARCH, 2024.**

**In the presence of:**

Mr. D. K. Kaburu for the Plaintiffs

Mr. Ng’arua holding brief for W. Gikonyo for the Defendant

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

