



**Ogega & 7 others v Ochwoga & another (Appeal 15 of 2022)  
[2024] KEELC 1805 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1805 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
APPEAL 15 OF 2022  
M SILA, J  
MARCH 19, 2024**

**BETWEEN**

**JULIUS MAGANGA OGEGA ..... 1<sup>ST</sup> APPELLANT  
CHRISTOPHER OSORO NYAKUNDI ..... 2<sup>ND</sup> APPELLANT  
RAPHAEL ROSANA MAGANGA ..... 3<sup>RD</sup> APPELLANT  
DAVID NYAKUNDI OGEGA ..... 4<sup>TH</sup> APPELLANT  
DANIEL NYABUTO ..... 5<sup>TH</sup> APPELLANT  
JOSHUA OMBATI OGEGA ..... 6<sup>TH</sup> APPELLANT  
JARED OMWANDO OGEGA ..... 7<sup>TH</sup> APPELLANT  
SIMION ONDARI ..... 8<sup>TH</sup> APPELLANT**

**AND**

**EVANS OCHWOGA ..... 1<sup>ST</sup> RESPONDENT  
MILKA MOGOI NYAKWAE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. Paul Biwott, Senior Principal Magistrate, Ogembo Law Courts, delivered on 6 July 2022 in the suit Ogembo SPMCC (ELC) No. E008 of 2022)*

**JUDGMENT**

1. This is an appeal against the ruling of Hon. Paul Biwott, Senior Principal Magistrate, Ogembo Law Courts, delivered on 6 July 2022. I had previously, in a ruling delivered on 11 July 2023, where it was contended that this appeal is incompetent for failure to seek leave, and which preliminary objection I dismissed, outlined the background to the suit. I will rehash the same background in more or less a format similar to the ruling of 11 July 2023.



2. The appellants were sued, as defendants, in the said suit, which was commenced by way of a plaint filed on 23 March 2022 by the respondents. In the plaint, the respondents pleaded that they are the legal representatives of the estate of Kemunto Kenyanya (deceased). They averred that the land parcel Bassi/Bogetaorio II/238 was registered in the name of the deceased. They contended that the appellants had trespassed into the said land, and in the suit, they asked for orders of eviction and permanent injunction against the appellants. Together with the plaint, the respondents filed an application seeking interlocutory orders of injunction which application was expressly stated to be brought under the provisions of Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A and 63 of the Civil Procedure Act. The respondent sought to restrain the appellants from “entering upon, trespassing unto, cultivating, sinking trenches, subdividing the suit land, planting or interfering with and/or in any manner dealing with suit land that is LR NO. Bassi/Bogetaorio II/238.”
3. The appellants opposed the application by filing a notice of preliminary objection claiming that the case is res judicata, and also a replying affidavit sworn by the 7<sup>th</sup> appellant. In the replying affidavit, it was deposed that there had been a previous suit, Kisii Chief Magistrates’ Court ELC Case No. 92 of 2019 against the 1<sup>st</sup> respondent’s father and the 2<sup>nd</sup> respondent, but they did not file any defence and this led to cancellation of their title deeds resulting in title reverting back to the name of Kemunto w/o Kenyanya. A copy of the plaint and decree was attached. From what I can see, the 7<sup>th</sup> appellant sued on behalf of the estate of Kemunto Kenyanya. The claim was that the late Kemunto was proprietor of the land parcel Bassi/Bogetaorio II/238. It was averred that the late Kemunto died in the year 1974 but in the year 1983, the 1<sup>st</sup> defendant in the suit, one David Ogega Ogachi, fraudulently caused the land to be registered in his name inter alia without first undergoing the succession process. The land was then subdivided into the parcels No. 2702, 2703 and 2704, which parcels were respectively registered in the names of Kiriment Ochwoga Nyamugutu, Milka Mogoi Nyakwae (2<sup>nd</sup> respondent in this appeal) and Seventh Day Adventist Church (Gekongo SDA). The decree, dated 16 June 2021, indicates that the suit was allowed hence having the subdivisions No. 2702, 2703 and 2704 cancelled, and the original title No. 238 reinstated and registered in name of Kemunto Kenyanya (deceased). Apart from the foregoing, the appellants contended that the respondents had fraudulently obtained a grant ad litem in respect of the estate of the late Kemunto.
4. The preliminary objection on the contention that the suit was res judicata was heard first and ruling delivered on 2 June 2022. The trial Magistrate was not persuaded that the suit was res judicata. His reasons were that the parties were different and it was not shown that the land in dispute was directly the subject of the case Kisii CMCC No. 92 of 2019. The preliminary objection having been dismissed, the application for injunction proceeded for hearing, and ruling was delivered on 6 July 2022 in favour of the respondents. The court was of opinion that they had established that they had purchased the land through the sale agreement displayed and they had thus demonstrated a prima facie case. The court stated that the subject matter of the suit needs to be conserved and issued the order of injunction as prayed, with the OCS Itumbe Police Station being ordered to ensure compliance of the order. The court directed that the case be fixed for full hearing.
5. This appeal was then filed. The following are the grounds of appeal :-
  - i. That the learned trial Magistrate grossly erred in law by granting an order of temporary injunction in a matter that he lacked jurisdiction and was res judicata.
  - ii. The learned trial Magistrate erred in law by not appreciating and or not taking judicial notice of the legal threshold in the grant of temporary injunction.



- iii. The learned trial (Magistrate) erred in law by ignoring the provisions of Section 82 of the Law of Succession Act relating to the purchase of the land belonging to a deceased person's estate.
- iv. The learned trial Magistrate granted an order of injunction without appreciating the binding precedents by the superior courts on the grant of orders of temporary injunction.
- v. That the learned trial Magistrate grossly misdirected himself in law by delivering a ruling that is hollow and not based on any sound legal basis or grounds.

The appellants ask this court to disallow the order of injunction and declare the suit *res judicata* and to have it struck out.

6. I invited counsel to file submissions towards the appeal and I have taken note of the submissions of Mr. Nyariki, learned counsel for the appellants, and Mr. Ochwangi, learned counsel for the respondents. I observe that in his submissions, Mr. Nyariki urged this court to declare that the suit before the Magistrate was *res judicata* and strike it out with costs. On his part, Mr. Ochwangi urged that the appeal against the ruling on *res judicata* is out of time as the same was delivered on 2 June 2022 and thus outside the 30 day period given to appeal. He submitted that if the appellants were keen to appeal against the ruling on *res judicata* they ought to have filed an appeal that was specific to that ruling. He did not see any fault in the grant of the interlocutory orders of injunction, since, in his view, they were meant to preserve the property pending hearing of the suit. I have taken all these into account before arriving at my judgment
7. It is true that this is an appeal against the grant of an order for injunction. However, one cannot divorce the issue of *res judicata* from the order of injunction, for *res judicata* was raised as one of the grounds to oppose the application for injunction. You see, in an application for injunction, one of the principles which guide the court, as espoused in the celebrated case of *Giella vs Cassman Brown (1973) EA 358*, is whether or not a *prima facie* case with a probability of success has been established. One can contest the demonstration of a *prima facie* case by pointing out that the case is *res judicata*, and urge that no *prima facie* case is established on that basis. It is a valid point in my view, and in this case, that holding that the case was not *res judicata*, though delivered in separate ruling, cannot be said not to be part of the matters to consider in determining whether or not the respondents deserved to be granted the order of injunction. In fact, *res judicata* is a threshold point, so that if the suit is *res judicata*, the trial court would have no jurisdiction to proceed with the matter at all.
8. It is trite that the jurisdiction of a court can be raised at any time, even on appeal, and this has had judicial recognition in several decisions including the decision of Ringera J in the case of *Adero & Another vs Ulinzi Sacco Society Ltd (2002) 1 KLR 577* where the court stated as follows at page 580 :  

“... it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.”
9. The above decision was adopted by the Court of Appeal in the case of *Kenya Ports Authority vs Modern Holdings (E.A) Limited (2017) eKLR* where the Court pronounced itself as follows :  

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised: “...at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the Court itself provided only that where



the Court raises it suo motu, parties are to be accorded an opportunity to be heard. (See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing).”

10. It is pointless for the respondents to wish that this court does not look at the issue of *res judicata*, and restrict itself only on the grant of the order of injunction, because if the suit is indeed *res judicata* it does not help returning it back to the Magistrates’ Court, for if there is no jurisdiction there is no basis upon which the matter can proceed before the Magistrates’ Court. I will echo the oft quoted dictum of Nyarangi J made in the case of Owners of the Motor Vessel ‘Lillian S’ vs Caltex Oil (1989) eKLR, where he stated as follows :

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence (emphasis mine).

11. In any case, as I have earlier argued, this court, as an appellate court, has the mandate to independently consider the application for injunction, given that this is an appeal against the grant of the order, and among the issues that the court must consider is whether a *prima facie* case has been established. There would be no *prima facie* case established if the case is *res judicata*. I think I have said enough to demonstrate that this court must determine whether or not the Magistrates Court had jurisdiction on the argument that the suit was *res judicata*. And I think all parties are alive to this question and indeed made arguments for and against the subject of *res judicata* before the trial court.
12. My view of this dispute is that it is not only *res judicata* but the case itself was an abuse of the court process. I say so because what the plaintiffs/respondents purported to present in their plaint was a case for the benefit of the estate of Kemunto Kenyanya, but in reality what they were presenting was a case that was no different from what had earlier been presented, and in fact in this instance, they were not filing suit for any benefit of the estate of Kemunto Kenyanya but for their own benefit, and indeed against the benefit of the estate of Kemunto Kenyanya. In the previous suit, Kisii CMCC No. 92 of 2019, the estate of Kemunto had sued the very plaintiffs herein and/or persons whom the plaintiffs represent. The 2<sup>nd</sup> defendant in that suit was Kiriment Ochwoga Nyamugutu, of whom Evans Ochwoga the 1<sup>st</sup> plaintiff/respondent herein, holds a grant of letters of administration. The 2<sup>nd</sup> plaintiff/respondent in the current suit, Milkah Mogoi, was the 3<sup>rd</sup> defendant in the previous suit. They were sued together with others so that their titles, which emanated from a subdivision of the suit land, i.e the land parcel Bassi/Bogetoario II/238, could be cancelled and the land to revert back to the original number 238 in the name of Kemunto Kenyanya. The suit was successful, meaning that whatever interest they had in the land was extinguished, and the land reverted to the estate of Kemunto Kenyanya. In the previous suit, their defence was that they had purchased the land. In this case, they plead the same thing, that they had purchased the land. The issue of whether or not they had properly purchased the land was canvassed in the previous suit and determined. It cannot form the basis of another suit and that is why I say and hold that the suit is *res judicata*.
13. I also say that the suit is an abuse of the court process because the plaintiffs/respondents cannot now take letters of administration for the estate of Kemunto Kenyanya and file suit on behalf of that estate whereas the same estate had sued them for recovery of the land and succeeded. They are masquerading as having the interests of the estate of Kemunto Kenyanya when in fact they have their own interest at heart and want the court to revisit the issue of sale of the land to them. They have even sued Joshua Ombati as the 7<sup>th</sup> defendant, yet he is the very person who had successfully sued on behalf of the estate



of Kemunto Kenya in the previous suit. How can they now file a suit asking that he be barred from the suit land yet he has been the administrator ad litem of the estate of Kemunto Kenya ? What the plaintiffs/respondents want is to get what they could not get in the previous suit by pretending to be suing on behalf of the estate of Kemunto Kenya. That is an abuse of the court process and no court should allow a person to abuse its processes and procedures by guise and guile which is exactly what the plaintiffs/respondents are doing.

14. I am afraid that given the above circumstances the trial court was wrong in holding that the suit was not res judicata. The court was also wrong in holding that the respondents herein deserved an order of injunction. There was no prima case established and indeed none could be established given that the applicants had lost the previous suit. What remains is for the suit land to be distributed in a succession matter to the beneficiaries of the estate of Kemunto Kenya.
15. I think I have said enough to demonstrate that the trial court not only erred in allowing the application for injunction but also erred in not striking out the suit in limine for being res judicata and/or for being an abuse of the process of court.
16. I proceed to set aside the order of injunction issued on 6 July 2022. I also proceed to order that the suit Ogembo SPMCC (ELC) No. E008 of 2022 be struck out with costs to the defendants in that suit who are the appellants herein.
17. The appellants shall also have the costs of this appeal.

Judgment accordingly.

**DATED AND DELIVERED THIS 19 DAY OF MARCH 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

