



**Lekaso v Mutwiri (Civil Appeal 96 of 2018)  
[2024] KECA 1291 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1291 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 96 OF 2018  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**MASIA SARIONKA LEKASO ..... APPELLANT**

**AND**

**FREDRICK NKONGE MUTWIRI ..... RESPONDENT**

*(Being an Appeal from the Judgement of the High Court of Kenya at Meru (A. Mabeya, J.) dated 12th April, 2018 in High Court Succession Cause no. 124 of 2012)*

**JUDGMENT**

**Introduction**

1. This is an appeal by Masia Sarionka Lekaso (the appellant) against the judgment of the High Court of Kenya at Meru (A. Mabeya, J.) dated 12<sup>th</sup> April, 2018 in High Court Succession Cause No. 124 of 2012. The appeal relates to the estate of Elias Kiruja Mukura (deceased) who died on 2<sup>nd</sup> September 2001.
2. Fredrick Nkonge Mutwiri, the respondent herein, petitioned for Letters of Administration Intestate for the estate of the deceased in his capacity as the son of the deceased. The grant was issued to him on 3<sup>rd</sup> July, 2012 and confirmed on 15<sup>th</sup> May, 2014. The asset comprising of the estate was Land Parcel No. Timau/Settlement Scheme/16 measuring approximately 7.4 Ha (the suit property).
3. After confirmation of the grant and distribution of the estate, the appellant moved the High Court on 8<sup>th</sup> July 2014 through summons seeking revocation of the grant on grounds that the proceedings that led to issuance of the grant were defective. Further, that the grant was obtained fraudulently by making of false statements and concealment of material facts. It was the appellant's claim that he was an administrator of the estate of Silonga Maser Olekaso (Silonga) (deceased) who had bought 9 acres of the suit property on which the family of Silonga reside and had fully developed it. It was the appellant's



claim that the respondent did not disclose this fact to the Court and excluded the family of Silonga from the proceedings.

4. The appellant's claim was opposed by the respondent through a replying affidavit sworn on 9<sup>th</sup> September, 2014 deponing that the application lacked merit and was an abuse of the Court process. Further, that the respondent maintained that the issues raised by the appellant were res judicata having being fully litigated in Meru CMCC No. 147 of 1997 which became subject to Meru HCCA No. 53 of 1999 in favour of the respondent. That the appellant also filed Nyeri HCCC No. 25 of 2010 (OS) which was struck out with costs to the respondent. According to the respondent, the appellant and his siblings were not living on the suit property.
5. Upon conclusion of the hearing and after analysis of the evidence, the High Court (A. Mabeya, J.) delivered its judgment dated 12<sup>th</sup> April, 2018 in favour of the respondent. The High Court found, inter alia, that the appellant relied upon a certificate of confirmation of grant in respect of the estate of Silonga dated 13<sup>th</sup> May 1996, which did not indicate that the estate had a claim over the suit property and that the estate of Silonga had been settled.
6. The High Court further held that:

“... In the present case, not only is the objector's claim of that of a 3<sup>rd</sup> party, but he has litigated it in civil courts which courts have already made decisions in those cases. Out of abundance of caution, this court called for the court files in the Meru CMCC No. 147/1997, Meru HCA 53/99 and the Nyeri HCCC No. 25 of 2010 (OS). The court confirmed that in all those cases there had been final orders made. There was no appeal pending in any of these cases. As result, this court cannot even invoke the provisions of Rule 41(3) of the Probate and Administration Rules and set aside the 9 acres for their ownership to be resolved.”
7. It is this finding that provoked the instant appeal. The appellant filed his notice of appeal dated 16<sup>th</sup> April, 2018 which was lodged on 18<sup>th</sup> April, 2018. The appellant in his memorandum of appeal dated 7<sup>th</sup> June, 2018 sought, inter alia, that the orders of the High Court dated 12<sup>th</sup> April, 2018 dismissing the appellant's application for revocation of grant be set aside; revocation of the confirmed grant in the estate of Elias Kiruja Mukura dated 15<sup>th</sup> May 2014; a declaration that the appellant is entitled to 9 acres of the parcel of the suit property; an order transferring 9 acres of the suit property to the appellant; and costs.
8. The appellant's grounds of appeal are that the High Court erred in law and in fact by:-
  - i. Dismissing the appellant's summons for revocation or annulment of grant dated 8<sup>th</sup> July 2014 on the ground that they were 3<sup>rd</sup> parties when in fact they were beneficiaries;
  - ii. Failing to find that the appellant had acquired a beneficial interest in the suit property;
  - iii. Failing to find that the respondent did not disclose all the liabilities owed by the Estate of Elias Kiruja Mukura (deceased) including the 9 acres of land owned by the appellant;
  - iv. Ignoring a purchaser rights despite agreement to that effect;
  - v. Relying on technicalities to dismiss the appellant's suit; and
  - vi. That the judgment dated 12<sup>th</sup> April 2018 is against the weight of evidence.



## Submissions by Counsel

9. At the plenary hearing the appellant was represented by Mr. Mutembei while Mr. Gikunda represented the respondent. Both counsel sought to rely on their written submissions with brief oral highlights.
10. The appellant's submissions were centered on three issues: whether the High Court erred by relying on technicalities to dismiss the appellant's suit; whether there is evidence of undisputed purchase of 9 acres of the suit property; and whether there is an established constructive trust in respect of the suit property in favour of the appellant.
11. On the first issue, counsel for the appellant submitted that the High Court dismissed the appellant's suit based on technicalities by finding that there were previous orders in other cases touching on the suit property claimed by the appellant; and that the probate court did not have jurisdiction to determine the appellant's claim. Counsel further submitted that the High Court erred in finding that there were final orders made in other previous cases, a finding that was erroneous as the previous claims were not determined with finality. Counsel asserted that the cases were defeated for failure to comply with technical procedures and negligence by the advocates who handled the matters. Counsel further submitted that none of the previous decisions faulted the evidence of purchase, payment and occupation of a 9-acre portion of the suit property by the appellant and his family nor determined the question of ownership. The appellant relied upon the case of *Re Estate of Barasa Kanenje Many (deceased)* [2020] eKLR in support of the proposition that where a party purchases property from the deceased then such a purchaser can be counted as a creditor to the estate.
12. On the issue of jurisdiction, counsel submitted that the High Court erroneously dwelt on the jurisdiction of the family court without considering the uniqueness of the matter and the inherent jurisdiction of courts to balance the scales of justice. Counsel asserted that the High Court ought to have considered remedies in equity beyond the strict confines of jurisdiction. Regarding the application of Rule 41(3) of the Probate and Administration Rules, counsel submitted that the High Court failed to apply the said rule. Counsel further asserted that the High Court ought to, at the very least, set aside the suit property awaiting final determination of ownership rights. Reliance was placed on the case of *Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR in support of this proposition.
13. On the issue of the undisputed evidence of the ownership of 9 acres of the suit property, counsel submitted that the respondent did not dispute the evidence in respect of the sale agreement and receipt of purchase price by the deceased between 1981 and 1982. Counsel asserted that the appellant and his family have lived on the suit property for over 30 years.  
  
That the appellant's father purchased a portion equivalent to 9 acres of the suit property but died before processing the title documents in respect thereto. Counsel further emphasized that the occupation of the suit property by the appellant is not disputed.
14. On the establishment of a constructive trust, counsel concluded by stating that there being no dispute in respect of the purchase and the appellant's occupation on the suit property, the High Court ought to have found that a constructive trust had been established in favour of the appellant. Reliance was placed on this Court's decision in *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* (2014) eKLR in support of this proposition.
15. In opposing the appeal, counsel for the respondent submitted that ownership of the suit property was determined and final orders made and no beneficial interests were established in favour of the appellant. Counsel asserted that the appellant and his siblings are not beneficiaries of the estate of the deceased. Counsel further submitted that the High Court called for the files of the previous cases in respect of



the suit property and found that in all the previous cases, there had been final orders made and that there was no appeal pending. Counsel further submitted that the appellant failed to prove his claim before the High Court. Further, that the appellant's case before the High Court was res judicata, and the High Court, therefore, had no jurisdiction in this matter. Counsel asserted that even the inherent discretion of the High Court could not confer jurisdiction on the court. Reliance was placed on the decision of Law Society of Kenya vs Standard Chartered Bank Limited [2021] eKLR in support of this proposition.

16. Regarding the issue of whether the appellant has proved any constructive or resultant trust in respect of the estate of the deceased, counsel submitted that the appellant did not prove possession of part of the estate of the deceased or at all. Counsel asserted that the allegation by the appellant that he and his family occupy a 9-acre portion of the suit property is a falsehood, which remains unproved. Counsel contended that the appellant's father had built a temporary structure on a small portion of the suit property, which was abandoned and no longer existed. Counsel emphasized that there are no developments made by the appellant's family on the suit property and that the appellant and his family vacated the suit property. Counsel asserted that the allegations of possession remain unsupported by any evidence. Counsel concluded that litigation between the parties was concluded many times and the matter should now be allowed to rest.

### **Determination**

17. This is a first appeal. The court reminds itself of its mandate as the first appellate court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses and make due allowance for that. See Rule 31 (1) of the Court of Appeal Rules 2022 and this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
18. After analyzing the grounds of appeal, we discern the following issues for determination before this Court: whether the appellant's claim for a portion of the suit property was res judicata; whether the appellant was a 3<sup>rd</sup> party and not a beneficiary of the estate; whether the circumstances of the case called for the presumption of a constructive trust in favour of the appellant; and whether the appellant is entitled to 9 acres of the suit property as prayed for in the memorandum of appeal.
19. On the issue of res judicata, we have noted from the record that the appellant was a party in Meru CMCC No. 147/1997, Meru HCA NO. 53 of 1999, Nyeri HCCC No. 25 of 2010 and Meru High Court Petition No. 4 of 2019. It is notable that the subject matter and the parties were the same in respect of the same claim regarding a portion of the suit property.

As found by the High Court, the matters were determined with finality and where the appellant lost the case, they did not file an appeal.

20. Section 7 of the *Civil Procedure Act* provides 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.”

21. The doctrine of res judicata was expounded by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313 as quoted in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport*



& Infrastructure & 3 Others (Petition [17 of 2015](#) (2021) KESC 39 (KLR) (Civ) (6 August 2021) (judgment) that:

“... Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same to open parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special circumstances, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at that time.”

22. From the foregoing, it is our view that the appellant’s claim before the High Court was *res judicata*. The appellant was introducing the same issues for determination which had been the subject of litigation before other competent courts being Meru CMCC No. 147 of 1997 and Meru HCCA 53 of 99 and final decisions made on merit. It is notable that the appellant did not file an appeal to contest any decisions where he was dissatisfied with the outcome thereof.
23. On the question whether the appellant was a beneficiary or a 3<sup>rd</sup> party whose interest cannot be determined by a family court, the High Court in the impugned judgment held as follows:

“21. ...this is a family court. Its jurisdiction is only limited to ascertaining who the beneficiaries of the estate of a deceased person are, what the extent of the estate is and the shares due to the respective beneficiaries. That jurisdiction does not extend to determining the rights or claims against the estate. What the family court can do, is to ascertain already established claims or rights which have already enured and/or conferred to the affected claimants.

The family court is strictly guided by the [Law of Succession Act](#) and the Probate and Administration Rules. Its purpose is to administer the estate of the deceased persons by determining the assets of the deceased, the dependants who are entitled to beneficial interest and subsequently distribute the assets among the said dependants. It is the guardian of the deceased for it ought to protect, collect and preserve the estate until it can ascertain the rightful beneficiaries. What’s more, to resolve disputes among personal representatives, survivors, beneficiaries and dependants.”

24. In the persuasive case of *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR the High Court (Musyoka, J.) stated as follows:

“The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.



Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a(sic) neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

...

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

25. By parity of reasoning, we find that the High Court did not err in finding that as a probate court it had no jurisdiction to determine the appellant's rights or claims against the estate of the deceased.
26. The upshot is that we find that the appeal is not merited. We find no reasons to disturb the findings made by the High Court. Accordingly, the appeal is hereby dismissed with costs to the respondent. It is so ordered. Dated and delivered at Nairobi this 20<sup>th</sup> day of September, 2024.

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

