



REPUBLIC OF KENYA



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**Reinhard v Hefti & 4 others (Civil Appeal E025 of 2020)
[2023] KECA 939 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 939 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E025 OF 2020
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

JOYCE JEPLETING REINHARD APPELLANT

AND

ELSBETH REINHARD HEFTI 1ST RESPONDENT

DANIEL BERNHARD REINHARD 2ND RESPONDENT

DAMARIS N'THENYA 3RD RESPONDENT

MAURIZIO MARINO 4TH RESPONDENT

ALFRED ANDREAS KELLER 5TH RESPONDENT

(Being an appeal from the ruling and orders of the High Court of Kenya at Mombasa delivered by M. Thande, J. on 2nd October, 2020 in Succession Cause No.26 of 2020 (formally Malindi Succession Cause No. 47 of 2008))

JUDGMENT

1. The appellant's memorandum of appeal which raises 5 grounds of appeal was filed on December 11, 2020 seeking orders to quash and set aside the impugned ruling delivered on October 2, 2020 by M. Thande, J, on the application dated December 24, 2019. The application sought an order that the case was *res judicata*, that the court had no jurisdiction to entertain the matter of title to land, that the judge stops any further proceedings in the matter and that costs be provided for. The learned judge dismissed the application and ordered that the summons for revocation of grant be fixed for hearing on priority, as the matter was old. The appellant was aggrieved by the ruling and so filed this appeal.
2. The appellant faults the learned judge's ruling for finding no merit in the appellant's application and dismissing it; for ruling that the 4th respondent and any other interested party could seek revocation of the grant even though not beneficiaries of the estate of the deceased; for holding it as far-fetched



the appellant's contention that the application by the 4th respondent for revocation of grant was *res judicata*; and., for holding that the ELC had no jurisdiction in succession matters.

Background

3. The appellant's counsel submitted that the matter is *res judicata*, as the cause was filed and concluded in Malindi Succession Cause No 47 of 2008. That succession cause became Mombasa High Court Succession Cause No 47 of 2008 after the Principal Judge transferred the cause from Malindi to Mombasa for disposal. The grant was confirmed on June 18, 2009 by H. A Omondi, J. (as she then was) in favour of the 1st and 2nd respondent. The 1st and 2nd respondent donated a general power of attorney to the appellant to file and conclude the succession cause. The appellant contends that after agreeing among themselves, the estate was transferred to her. The appellant filed Malindi ELC No 108 of 2012 and obtained judgment on the July 19, 2018, against the 3rd respondent and one Giovanni Ozzi. Resulting from that judgment the 3rd respondent and her tenants were declared trespassers and were evicted from the plots.
4. Following the eviction, the 3rd respondent filed an application dated June 26, 2019 seeking, among other orders, that the grant issued to the 1st and 2nd respondent on the June 18, 2009 be revoked and annulled, and that pending the hearing and determination of the application the grant be suspended. The 4th respondent also filed an application dated September 30, 2019, alongside Amici Miei Ltd, seeking to have the grant confirmed on June 18, 2009 revoked and expunged from the court record.
5. The appellant filed respective responses to both applications. She also filed the application dated October 24, 2019, the subject of this appeal, seeking the orders as mentioned herein above. It is the dismissal of that application that triggered this appeal.

Submissions

Appellant

6. Mr Songok for the appellant suggested the issues that were for determination were four:
 - a. Whether the court had jurisdiction to entertain the application for revocation of grant, which had been executed, and the title deeds issued.
 - b. Whether the 3rd respondent and interested parties had *locus standi* to apply for revocation of the grant in the succession cause?
 - c. Whether the matter was *res judicata*?
 - d. Who should bear the costs of the appeal?
7. Mr Songok addressed the issue whether the High Court had jurisdiction to entertain the applications from the respondent and the IP. Making reference to section 2 and 47 of the *Law of Succession Act* [LSA] and article 162 (2) of the *Constitution*, he urged that even though the High Court and the ELC appear to have concurrent jurisdiction, the case is distinguishable. He argued that the appellant obtained good title after the general power of attorney was donated to her by the 1st and 2nd respondent, and using it with their concurrence, the suit lands were transferred to her. He buttressed that argument with the provisions of section 79 of the LSA, and urged that the property of a deceased person passes to his personal representatives, with power, *inter alia* to sell or turn assets to account. That the 1st and 2nd respondent in exercise of their power under section 79 of the LSA transferred the property to her, as



wife of the 2nd respondent. That as a result, the appellant became the registered owner of the property on March 18, 2015.

8. Regarding *locus standi* of the 3rd respondent and the IPs to apply to revoke the grant, it was urged that they had none, for reason Malindi ELC No 108 of 2012. (Olola, J) declared them trespassers over the same property, and that the judgment still stands unchallenged, and for that reason they should not be given audience. He invoked section 39 and 76 of the LSA, and urged that they were not dependents of the deceased estate. He urged that for the same reasons the matter was *res judicata* ELC 108 of 2012.

1st & 2nd Respondent

9. Mr Kithi for the 1st and 2nd respondents in their written submissions urged that the appeal is an afterthought and an abuse of the court process. According to the 1st and 2nd respondents, the appeal arises from the Malindi succession cause No 47 of 2008; In Re: the Estate of Daniel Bernhard Hefti (deceased) where the issue under consideration was who of the parties was legally entitled to deal with the estate properties. Counsel urged that to claim that the suit is *res judicata* is disingenuous at the very least, and an outright falsehood, in so far as the suit filed before Malindi ELC No 108 of 2012 was filed on the strength of the grant of probate intestate issued in the High Court Malindi succession cause No 47 of 2008, from which this appeal arises.
10. Mr Kithi submitted that accordingly, any challenge to the grant of probate intestate in Malindi succession cause No 47 of 2008 cannot be opposed on the basis of *res judicata* so far as the very competence of the plaintiffs in the Malindi ELC suit to file the said Malindi ELC suit has come up for determination.

4th Respondent

11. Mr Kinyua for the 4th respondent relied on their written submission dated May 17, 2022. He submitted that there were proceedings in Kapsabet, Eldoret, Malindi and Mombasa all concerning the estate of the deceased in Kenya, comprising of 3 plots in Watamu, Kilifi county. He urged that the deceased left a valid will that went through probate in Switzerland in June 1999. That it was not until November 2021 that the courts in Kenya saw the will. He submitted that the appellant obtained letters of administration intestate to the deceased estate and that it was through fraud. He submitted that the ELC did not hear and determine summons for revocation of the grant of letters of administration hence the ground that the application was *res judicata* is misplaced. According to the 4th respondent, the appellant is not the administrator of the estate as the power of attorney upon which she had obtained the grant was revoked hence she does not even have the capacity to file this appeal. It is submitted that the 4th respondent and Amici Mieit Ltd were not parties in the ELC cause nor was the issue substantially or remotely a subject matter before the court.
12. We have considered the issues raised in this appeal. This being the first appeal, this court's mandate is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.
13. Having considered the submissions by counsel, the affidavits filed by the respective parties and the cases relied upon, we think that what falls for our determination are two issues; whether the High Court had jurisdiction to entertain the applications filed before it by the 3rd respondent; and, whether the matter is *res judicata*.
14. Before we deal with the appeal, we need to put the record straight. We note that the appellant referred to some parties as interested parties. However, there are no such party or parties in this appeal, and the interested parties in the trial court are now all respondents in the appeal.



15. Getting back to the appeal, the first issue of whether the High Court had jurisdiction to entertain the applications filed before it by the 3rd respondent. There are two applications, one by the 3rd respondent which was a summons for revocation of grant dated June 26, 2019 seeking, *inter alia* that the grant to the 1st and 2nd respondents issued on the June 18, 2019 be suspended pending hearing and determination of the summons for revocation and annulment of grant. The second one was by the 4th respondent and another not a party to the case. It was dated September 30, 2019 and sought to have the grant issued on June 18, 2019 put in abeyance pending hearing of the application *inter partes* for the revocation of the said grant. Both applications are brought under section 76 (a), (b) and (c) of the LSA and *Probate and Administration Rules* cap 160 Laws of Kenya.
16. Mr Songok submitted that there was an apparent concurrence of jurisdiction between the High Court and the ELC regarding land, He however urged that this case was distinguishable but did not quite show the distinguishing factor in this matter.
17. There is no belittling the importance of jurisdiction. In the leading case on this issue of “*Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* (1989) I KLR dealt with a court, jurisdiction thus:-
- “Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction
- ...where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. jurisdiction must be acquired before judgement is given”.
18. It is trite that jurisdiction is prescribed by the *Constitution* or statute. The two applications in the case before the High Court have been brought under section 76 (a), (b) and (c) of the LSA which provides as follows:
76. Revocation or annulment of grant
- A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-
- a. that the proceedings to obtain the grant were defective in substance;
 - b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
19. Section 3 of the LSA on Interpretation defines "court" means a court having jurisdiction under this Act in the matter in question. While section 47 more specifically spells out in plain language the court with jurisdiction as follows:
- “47. Jurisdiction of High Court



The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

20. We find that the applications having been brought under the *Law of Succession Act*, the court with jurisdiction in matters falling under that Act is the High Court. The law is clear concerning the jurisdiction and mandate of the Land and Environment Act.

21. Under article 162 of the *Constitution*, the systems of courts are provided thus:

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land;
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).” [emphasis added]

22. The *Constitution* then gave this exclusion clause regarding the jurisdiction of the High Court:

5. The High Court shall not have jurisdiction in respect of matters—
 - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).”[emphasis added.]

23. And to crown it all the jurisdiction of the *Environment and Land Court Act* No 19 of 2011 is prescribed under section 13 as follows:

13. Jurisdiction of the court

1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.



2. In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.

24. A scrutiny of this provision is clear that in matters of ‘probate and succession the ELC has no jurisdiction. That jurisdiction remains the purview of the jurisdiction of the High Court. We fail to see any convergence between the matters of succession and the mandate of the ELC on issues of land. The High Court was right to rule that it had jurisdiction to hear the two applications challenging the confirmed grant issued to the 1st and 2nd respondent on June 18, 2009. We find that nothing turns on this point.

25. The second issue is whether the matter before the High Court was *res judicata*. In *Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 others* [2021] eKLR, the Supreme Court of Kenya extensively examined the doctrine of *res judicata* stating that:

“That the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

26. In that decision, the Supreme Court cited with approval the words of Justice Russell of the Federal Court of Canada in the case *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 (CanLII) that the “preconditions for *res judicata*” are that, firstly, “the same question was decided in earlier proceedings. Secondly, that “the judicial decision which is said to create the estoppel was final” and



third, that “the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.” The Supreme Court of Kenya then pronounced that:

“For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former judgment or order which was final;
- b. The judgment or order was on merit;
- c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action.”

27. The above are the principles that will guide our decision on this matter. The appellant contends that the parties in this appeal participated in Malindi ELC No 108 of 2012, and according to her the issue before that court concerned the validity of the grant and the resultant titles. Mr Kithi for the 1st and 2nd respondent urged that the ELC case was filed on the strength of the grant which is now challenged before the Succession Court in High Court Mombasa. He urged that the question before the High Court is who is/are entitled to deal with the properties of the estate of the deceased, by identifying the genuine heirs and beneficiaries of the estate of the deceased, which was not a matter before the ELC. That neither could the ELC deal with those issues, even though part of the estate is land. Mr Kinyua, most respectfully did not address the issues which are for determination here.

28. We have looked at the ELC case No 108 of 2012. The parties were the 1st, 2nd respondents and the appellant as the plaintiffs. The defendants were the 3rd respondent and one Giovanni Ozzi. The subject matter as per the amended plaint was over the land properties the subject matter of the suit from which this appeal arises. The reliefs sought included a permanent injunction against the defendants, special damages, payment of rent earned from the three plots, mesne profits, damages for trespass and eviction. Olola, J. delivered the judgment in that matter on July 19, 2018, in favour of the plaintiffs.

29. Applying the principle in *Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure, (supra)*. The subject matter in the ELC case was for the eviction of the defendants and for a claim for mesne profits. The grant issued to the 1st and 2nd respondents in the Malindi Succession Cause was used to file the ELC suit.

The succession matter involves the identification of dependents and beneficiaries of the estate of the deceased person for purposes of transmission. The pending applications are challenging the issuance of the confirmed grant to the 1st and 2nd respondents. Therefore, the subject matter in both cases is different. Some of the parties in both suits are the same. The ELC has clearly no jurisdiction over the pending matter before the High Court. We therefore find that even though there is a judgment and order in ELC case No 108 of 2012 that does not resolve the issue pending before the succession cause and does not render those applications *res judicata*.

30. The Supreme Court concluded by stating that there must be between the first and the second action identical parties, subject matter and cause of action. That means the principles of assessing whether the suit is *res judicata* are conjunctive not disjunctive. Therefore, failure to meet any one of the tests will result in a negative finding. The ELC case and the present suit do not meet the criteria set by the Supreme Court for the reasons we have discussed above. We find the appellant’s appeal devoid of merit and dismiss it in its entirety with costs to the respondents.



DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

