



Karanja (Suing as the Legal Administrator of the Estate of Frider Wanjiru Karanja) v Kamau & 2 others (Environment and Land Appeal E081 of 2022) [2024] KEELC 3824 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E081 OF 2022**

**JG KEMEI, J
MAY 9, 2024**

BETWEEN

CAROL WAITHIRA KARANJA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF FRIDER WANJIRU KARANJA) APPELLANT

AND

DAVID NDERI KAMAU 1ST RESPONDENT

PRUDENTIAL CAPITAL LIMITED 2ND RESPONDENT

THE LAND REGISTRAR, RUIRU 3RD RESPONDENT

(Being an appeal against the Ruling of Hon C Kisiangani SRM at RUIRU delivered on the 15th day of September 2022 in ELC E164 of 2021)

RULING

1. The Appeal arises from the decision of the trial Court cited above on the grounds as set out in the Memorandum of Appeal and dated the 29/9/2022 as follows;
 - a. The Honourable trial Magistrate erred in law and fact in not appreciating the weight of the prima facie evidence placed before her and she therefore arrived at an erroneous Ruling.
 - b. The learned Magistrate never put her mind into the fact that the land dispute was actually premised on a serious Criminal act of the 1st Respondent who had shamelessly forced and impersonated the Appellant's mother to the Land Control Board, Ruiru and who presented a forged transfer form to the Land Registrar and who (1st Respondent clandestinely managed to transfer an illicit acquired title to unsuspecting members of the public).



- c. The learned trial Magistrate did not look and considered that the land dispute arose from an open illegality where a deceased person came out of her grave to sign the application for Land Control Board and she when still deceased obtained a rates clearance and she still in the grave also executed a Land Transfer Form in favour of the first Respondent who is a land fraudster known in the public dormain.
- d. The trial Magistrate never put her mind into the nature of the dispute she was dealing with and she never paced her legal mind to interrogate the issue of law in the proper interpretation of the principle of “Res Judicata” which escaped the subsection that permits the filing of a fresh suit if the withdrawal of a suit happens before the final Judgment.
- e. The trial Court erred in law in that she never considered that a withdrawn case under subsection 25 of the relevant Act may be filed afresh and that the ground of withdrawal of Civil suit at Thika Law Courts and the fact that the Thika Magistrate could not have given substantive Judgment on a grave issue of a dispute of ownership of land to third parties arising from a fraudster’s title knowing that in law there is no person can be in a position to acquire a good title to land if the transferor acquired the title tinted with illegality or by fraud.
- f. That the learned trial Magistrate never put her mind into the issue of how the subsequent owners of the sub-plots of L.R NO. Ruiru/Ruiru East Block 2/2478 who have developed their respective parcels will ever obtain their proper title deeds which honesty the Appellant will not deny the parties even if they were conned.
- g. The learned trial Magistrate never considered that a Criminal case pending at Thika Law Courts Criminal Case No. 5244 of 2019 involved a dispute over L.R No. Ruiru/Ruiru East Block 2/2478 over who signed / executed documents in favour of the Appellant’s mother who had by then died and who may have been impersonated to the Appellants (woman) before the Appellant’s mother who had long died in order to arise in her grave to appear before the LCB.
- h. The learned trial Magistrate clearly misunderstood the law in that a suit once withdrawn may under the relevant order No. 5 may not be a bar to filing of a fresh suit since the miscellaneous suit could not be determined justifiable to arrive into a full hearing and to enable a Court to hear parties.
- i. The Honourable trial Magistrate overlooked at her exercise of the concurrence jurisdiction of the earlier trial Court and in arriving at her Ruling she did not see any annexure of the Ruling of the earlier Court and in order to say it was “Res Judicata” she never understood what the term was legislated to resolve.
- j. The learned Magistrate arrived at a decision that is erroneous and if the dispute over ownership over ownership of the land by the 2nd Respondent still persists it means that the issues over the ownership were not effectually dealt with and it is incontrovertible that no good title was held by the 2nd Respondent.
- k. The learned trial Magistrate never answered nor did she direct her mind into the issue of a deceased seller who did not even sign an agreement for sale was able to resurrect from her grave or cremation to appear before an advocate, append her signature/seal, appear before a L.C.B Board present her Transfer of land document, pay all the government dues to wit land rent and obtain a land rent clearance certificate and pay the requisite rates clearance certificate so that the purported purchaser of “air” may be in a position to dispose any “interest over a land in accordance with Section 3(i)(ii) of the [law of contract Act](#) Chapter 23 Laws of Kenya.



1. The learned Magistrate did not exercise her discretion in that she never saw any Judgment or decree of the suit of the lower Court and she closed her eyes as to whether a final decision is arrived at as a “Judgment” decree or final order in a land dispute thereby she opened a “padoras” box to the land ownership of L.R. No. Ruiru/Ruiru East Block 2/2478.
2. The Appellant sought the following orders on appeal;
 - a. That the appeal as preferred be allowed on the terms below and the Honourable Judge do order that a Court of concurrent jurisdiction do proceed to hear the proposed reinstated suit.
 - b. That the orders given online by the trial Court on the 15th day of September 2022 be set aside in the entirety.
 - c. That the Honourable Court be pleased to make orders for a restriction over all dealings over the suit land until the final determination of ownership is determined which is a subject suit in ELC E164 of 2021 at Ruiru Law Courts.
3. On the 3/5/2023 directions were taken to canvass the appeal by way of written submissions. But for one reason or another the Appellant failed to comply until the 28/2/24 after the Court noted that the delay was unexplained and issued final directions for compliance default of which the appeal was to stand dismissed.

The Appellant’s written submissions

4. On whether the appeal is merited the Appellant submitted that she filed written submissions to the Preliminary Objection dated the 8/6/22 on the 29/8/22 and that the 1st Respondent filed on the 5/9/2022 and that the learned Magistrates conclusion that the Preliminary Objection was undefended was not proper.
5. Relying on the decision in the case of *Mukisa Biscuit v West End Distributors* [1969] EA 696, the Appellant submitted that the successful determination of the Preliminary Objection required the Court to examine, consider and weigh facts thus ousting it from being a pure point of law.
6. On the question of whether the suit was Res Judicata, the Appellant relied on the provisions of Section 7 of the *Civil Procedure Act* and the decision of the case on *John Florence Maritime Services Limited & Anor v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021]eKLR and submitted that the doctrine of resjudicata does not apply to this suit since the earlier one Misc Application No 131 of 2018 was duly withdrawn with the leave of the Court before the same was determined with finality. That the current Respondents having been parties in the earlier suit were duly notified and having there been no objection the Court allowed the withdrawal subject to costs.
7. The Appellant further submitted that the reason why the suit was withdrawn was on advice of her new legal Counsel that the orders she was seeking were better sought in an ordinary suit where oral evidence would be presented tested through cross examination, other than a miscellaneous application.

The 1st Respondent’s submissions

8. On whether the appeal has merit, it was submitted that the Appellant filed a suit in Misc 131 of 2018 involving the same parties, subject matter and orders. That she then withdrew the same and filed this current suit. That the pleadings in the current suit does not disclose the previous suit. Reliance was placed on various precedents of the Court to show that the conduct of the Appellant amounts to an abuse of the process of the Court. That the Appellant is abusing the judicial process to the irritation and annoyance of the Respondents and the Court. See *Kimunya v Mohammed & Anor* [2022] KLR;



Satya Bhamu Gandhi v Director of Public Prosecution & 3 Others [2018] eKLR where the Hon Justice Mativo gave a detailed list of what constitutes an abuse of the process of the Court.

9. Lastly and in the foregoing, the 1st Respondent urged the Court to order the Appellant to pay the costs of the appeal.
10. It was submitted that the parties herein had litigated for a period in excess of 5 years in Misc No 131 of 2018, Thika, facts which were not disclosed by the Appellant in the new suit filed in ELC 164 of 2021, Ruiru. That the Appellant filed the suit in Ruiru not only to defeat justice but with unclean hands.
11. That despite the case in Misc No 131 of 2018 -Thika was heard on diverse dates till the parties closed their cases, the Appellant on the 16/11/21 filed a change of advocates simultaneously with notice of withdrawal of suit. The withdrawal of the suit was confirmed on the 24/11/21 when the matter came for mention to confirm compliance with the filing of the written submissions as directed by the Court. The Court noted the withdrawal of the suit and directed parties to apply for the taxation with regards to costs.

The 2nd Respondent's submissions

12. Relying on the decision of the Court in Richard Muthusi v Patrick Gituma Ngomo & Anor [2017]eKLR the 2nd Respondent submitted that the suit filed in Ruiru was an abuse of the Court process as founded by the trial Court. Also citing the decision in Kiambu County Tenants Welfare Association v Attorney General & Anor [2017]eKLR, the 2nd Respondent reiterated that the conduct of the Appellant in filing multiple cases involving same parties and issues is an abuse of the Court process. In addition that the withdrawal of the suit in Thika was premeditated on subjecting the Respondents to unwarranted fresh litigation.
13. The Court was referred to the case of Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others [2022]eKLR where the Court stated that;

“ Even though a Court of law should try as much as possible to allow a suit to be determined on its merits, the Court should not shy off taking action to rid the Court process of proceedings that are clearly an abuse of the Court process. In the premises the proper order that commends itself and which I will proceed to grant is to stuck out the suit for being an abuse of the Court process.”
14. The 2nd Respondent cited diverse dates when the Appellant failed to comply with directions of the Court to show that the Appellant is not a serious litigant who files cases and fails to prosecute at the detriment of the 2nd Respondent who continue to suffer loss and damage.

The 3rd Respondent's submissions

15. Citing the provisions of Section 7 of the [Civil Procedure Act](#) and the decision in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017]eKLR, the 3rd Respondent submitted that the suit in ELC 164 OF 2022 - Ruiru is resjudicata, It urged the Court to dismiss the appeal with costs.

Analysis and determination

16. Having considered the record of appeal, the trial Court record, the written submissions and all the material placed before the Court the issues that commend themselves for determination are;
 - a. Whether the parties in the trial Court failed to file written submissions with respect to the Preliminary Objection dated the 8/6/2022.



- b. Was the Preliminary Objection a pure point of law?
 - c. Who meets the cost of the appeal?
17. It is trite that the duty of an appellate Court like in this case is to re-evaluate, re-assess and re-analyse the extracts of the record and draw its own conclusions. Furthermore, this Court is bound to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.

Whether the parties in the trial Court failed to file written submissions with respect to the Preliminary Objection dated the 8/6/2022.

18. The background of the suit in the trial Court is necessary. On the 12/10/18 the Appellant filed Misc No 131 of 2018 in Thika – Carol Waithera Karanja v David Nderi & 2 Others seeking declaratory orders inter alia that the suit land parcel Ruiru/Ruiru East Block2/2478 belongs to the Appellant, permanent injunction against the Respondents from interfering with the suit land and that the title in the name of the 2nd Respondent be cancelled and reverted to the name of Frider Wanjiru Karanja, deceased.
19. It is commonly stated by all the parties that the suit was heard on diverse dates to completion and when it came for mention to confirm filing of written submissions, the Appellant formally withdrew the suit. The Appellant has explained that she was advised by her new Counsel that for her dispute to be properly adjudicated she needed to file an ordinary suit hence the action to withdraw the suit on the 16/11/2022.
20. On 26/11/2021 the Appellant filed ELC 164 of 2021 at Ruiru which was amended with leave of the Court on 23/3/22 seeking the following orders;
- a. An order for a declaration that the Plaintiff Carol Waithera Karanja is the legal owner as by transmission of the estate of Frider Karanja L.R. No. Ruiru/Ruiru/Block2/2478.
 - b. That all trespassers be evicted.
 - c. An order for cancellation of all entries and title deeds issued pertaining L.R. Ruiru/Ruiru East Block2/2478 in respect of the 1st and 2nd Defendants.
 - d. A permanent injunction directed against the 1st and 2nd Defendants from any way interfering with the Plaintiff's quiet possession, utilization and occupation of L.R. No. Ruiru/Ruiru East Block 2/2478.
 - e. An order directed against the Land Registrar – Ruiru to issue a new title deed to the Plaintiff upon payment of the requisite processing fees.
 - f. Any other order that this Honourable Court may deem fit and just to grant.
 - g. Costs of this suit be provided for.
21. Simultaneously with the filing of the plaint the Appellant filed a notice of motion dated the 3/12/2021 seeking inter alia orders for summary judgement against the Respondents.
22. In response to the aforesaid motion the 1st Respondent filed the grounds of opposition dated the 11/1/2022 and the Replying Affidavit sworn on the 19/1/2022.
23. In addition, he filed the Preliminary Objection dated the 8/6/2022 to the Notice of Motion dated 10/4/2020 expressed on the following grounds;



- a. That the Plaintiff had filed another similar matter with similar parties at Chief Magistrate's Court at Thika Misc. Civil Case 131 of 2018 and that fact was not disclosed to the Court when filing this suit.
 - b. That the said suit went through all processes until the time parties were to get a Judgment date and during the mention to confirm filing of final submissions the Plaintiff decided to withdraw the suit without giving any reason which application was allowed.
 - c. That the Applicant failure to disclose this material facts which are so crucial to this suit is an abuse of Court process.
 - d. That the Application seeks orders which can not be enforced by this Court and Court orders are not issued in vain.
 - e. That the Application is incurably defective, incompetent and unsustainable and lack merit in law.
 - f. That the Application is frivolous, vexatious, non-starter and otherwise an abuse of Court process and ought to be struck out with costs.
24. I have carefully perused the record and I fail to find an application dated the 10/4/2020. I wish to add that the suit in ELC 64 OF 2021 was filed in Ruiru on the 26/11/21. To the extent that the Preliminary Objection is objecting to an application dated the 10/4/2020, is sufficient ground to dismiss the Preliminary Objection for want of such a pleading. Parties are bound by their pleadings.
25. Having held as above, the Court finds it wholesome to determine the appeal on its merits.
26. Be that as it may the Court directed the parties to file their written submissions with respect to the Preliminary Objection within 7 days on the 2/6/22. When the matter came for mention on the 27/7/22 the advocates for the Appellant sought an additional 7 days to comply. The Ruling was reserved for 15/9/22.
27. The Court delivered its Ruling as follows;
- “2. That the said suit went through the hearing processes until the time parties were to get a Judgment date and during the mention to confirm filing of the final submissions the Plaintiff decided to withdraw the suit without giving any reason which application was allowed.
 3. That the Applicant's failure to disclose these material facts which are so crucial to this suit is an abuse of the Court process.”
28. It is this Ruling that has triggered this Appeal.
29. The gist of the Ruling is that the Preliminary Objection was undefended on the basis that none of the Appellant filed written submissions, a position that has been challenged by the Appellant in her appeal. I have perused the record and note that although the Appellant and the 2nd Respondent failed to comply with the deadlines they nevertheless filed the written submissions out of time that is to say the 25/8/22 and 5/9/22. The 1st Respondent supported the Preliminary Objection and undertook not to file any submissions. The Hon Magistrate noted in her Ruling that the Appellants submissions were not on record. It has not been explained by the Appellant how the submissions in the record of appeal found its way into the trial Court's record. The trial Court record does not contain the Appellants submissions. I have perused the trial Court record and to extent that the 2nd Respondent's submissions



filed on the 5/9/22 are in the trial file and none from the Appellant, the Court agrees with the trial Court that indeed the Appellant's submissions were not present on record.

30. I shall now consider the Preliminary Objection as filed to determine whether it is a pure point of law.

31. A Preliminary Objection must consist of a pure point of law which arises from the pleadings either express or impliedly. This was the dictum in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the Court pronounced itself as follows;

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ...”

32. From the forgoing if any of the facts are to be ascertained by the Court or if the Court is being called upon to exercise its discretion in a matter the objection ceases to be a pure point of law.

33. In this case the objection was based on the grounds that there existed a similar matter filed by the Appellant in *Thika – Misc 131 of 2018*; the suit being ELC 164 of 2021 is an abuse of the process of the Court; and that the orders sought are incapable of being enforced. In all these issues raised the Court is being called upon to examine facts contentious and otherwise to determine if the objection is a pure point of law. I find that the Preliminary Objection was ousted and in my view it ceased to be a pure point of law.

34. Withdrawal of suits is provided for under Order 25(1) and (2) of the Civil Procedure Rules which states as follows;

“ 1. Withdrawal by Plaintiff [Order 25, rule 1.]

“At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

1. Discontinuance [Order 25, rule 2.]

1. Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

2. Where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.



33. The provisions of this rule and rule 1 shall apply to counterclaims.”

35. The Court has found and as commonly agreed by the parties that the Misc 131 of 2018 was withdrawn with the leave of the Court where the parties were directed to file their taxation as to costs. The import of this is that the Respondents did not object to the withdrawal save for costs.

36. Section 7 of the *Civil Procedure Act* states as follows;

“7. Res Judicata

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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

37. To the extent that Misc No 131 of 2018 was withdrawn with the leave of the Court, the Court finds that there was no judgment or final determination of the suit in finality and therefore the principles of Res Judicata are not applicable to ELC 64 of 2021.

38. Is the suit an abuse of the process of the Court? In the case of Kiambu County Tenants Welfare Association Vs. Attorney General & Another [2017]eKLR where the Court attempted a definition of the term abuse of the process of the Court as follows;

“The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-



- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- (e) Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purpose3s of the action.
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an Appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first.”

39. The 1st and 2nd Respondents are united in their submissions that the Appellant filed the second suit to drag them through the Court process while exhibiting no seriousness in prosecuting them. Instances of dilatory acts of the Appellant were cited. I find that the Thika case having been withdrawn there is therefore no duplicity of suit by the Appellant.
40. I have perused the case of Ephraim Miano (supra) and find that the issues are distinguishable in that the issue of subjudice was founded unlike in the circumstances of this suit wherein the suit was withdrawn at the dawn of taking directions for judgement.
41. With respect to grounds Nos. 1, 2, 3 and 5 the same be and are hereby struck out because the same were never canvassed in the Ruling of the learned Magistrate.
42. In the end I find that the Preliminary Objection was incompetent to the extent that it was objecting to an application dated the 10/4/2020.
43. Even if I was to be wrong on the findings in para 42, the Court on consideration has found that the Preliminary Objection called upon the Court to examine facts thus ousting it from being a pure point of law.

Contentious issues in the suit

44. In view of the nature of the contentious issues raised by the parties in the suit, justice will be served if the suit is heard and determined on merits.



45. In the end the appeal is partially upheld to the extent that the Preliminary Objection is dismissed. The orders of the learned Magistrate issued on the 15/9/2022 be and are hereby set aside in its entirety.
46. The costs shall be in the cause.
47. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwangi for Appellant

Kimani for 1st Respondent

Njengo for 2nd Respondent

3rd Respondent – Absent

Court Assistant – Phyllis

