



**Ngondi & another v Ngondi (Environment and Land Appeal  
E031 of 2023) [2025] KEELC 716 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 716 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E031 OF 2023  
JM MUTUNGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**GLADYS WARUTUI NGONDI ..... 1<sup>ST</sup> APPELLANT**

**EUNICE WAINOI NGONDU ALIAS EUNICE WAINOI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PAULINE NJERI NGONDI ..... RESPONDENT**

*(Being an Appeal from the Ruling and subsequent Orders of Hon.  
Cheruto C. Kipkorir Principal Magistrate sitting vide Kerugoya  
MELC Case No. E 17 of 2022 delivered and dated 3rd May 2023)*

**JUDGMENT**

1. This appeal is against the Ruling delivered by Hon. Cheruto C. Kipkorir (P.M) on 3<sup>rd</sup> May 2023 in Kerugoya CM ELC No. E17 of 2022. By the Ruling the Honourable Learned Magistrate upheld a preliminary Objection taken by Respondent who was the Defendant in the suit before the Lower Court that the suit was resjudicata and statute barred under the *Limitation of Actions Act* Cap 22 Laws of Kenya. The Learned Trial Magistrate struck out the suit and ordered that the parties bear their own costs of the suit.
2. The Appellants who were the Plaintiff in the suit were dissatisfied with the Learned Magistrates decision and sought and were granted leave to appeal against the Ruling. The Appellants have set out 3 grounds of Appeal in their Memorandum of Appeal dated 1<sup>st</sup> November 2023 as follows:-
  1. The Honourable Learned Magistrate erred in law and fact by finding that the Preliminary Objection dated 21/2/2023 raised by the Respondent raised a pure point of Law.



2. The Honourable Learned Magistrate erred in law and fact by finding that the Preliminary Objection met the threshold laid in the *Mukisa Biscuits –vs Westend Distributors Ltd(1969)EA 696*.
3. The Honourable Learned Magistrate erred in law and fact by upholding the Preliminary Objection.
3. The Appellants pray that the Ruling and/or orders issued on 3<sup>rd</sup> May 2023 be set aside and the suit be allowed to proceed and to be heard on merit.
4. The background to this matter is that the Appellants and the Respondent are Co-wives of the late Ngondi Gachoki (deceased) who was initially the registered proprietor of LR No. Mutithi/Strip/77 before he subdivided the same into LR No. Mutithi/Strip/468 and 469 in 1996. That the deceased caused land parcel Mutithi/Strip/469 to be registered in his name jointly with the Respondent who was his 3<sup>rd</sup> wife while parcel 468 remained in the deceased name. Upon discovering their husband had caused land parcel 469 to be registered in the Respondent's (3<sup>rd</sup> wife's name) the Appellants filed a dispute with the Land Disputes Tribunal at Mwea. The dispute was heard and the Tribunal ordered that the two titles be merged as they were before the subdivision and be shared equally into 4 portions between the wives and the deceased with each getting approximately 2½ acres. The Tribunal's award was endorsed by the Resident Magistrate's Court at Wang'uru on 24<sup>th</sup> September 2002 but was apparently never executed/implemented.
5. The husband to the parties died on 12<sup>th</sup> September 2003 and the Respondent on 1<sup>st</sup> October 2021 had the title in respect of Mutithi/Strip/469 issued in her name as sole proprietor upon the registration of death of the joint proprietor. The Appellants vide the Complaint dated 10<sup>th</sup> November 2022 averred that the deceased held the suit land before his death in trust for the Respondents and the family and that the Appellant upon being registered as proprietor of land parcel 469 equally held the said land in trust for herself and the other members of the family. The Appellants prayed that the trust be determined and the land after being combined be registered in the names of the Appellants and the Respondent to hold in trust for the children of the family of the late Ngondi Gachoki (deceased).
6. The Respondent in her defence dated 20<sup>th</sup> April 2022 admitted their deceased husband was the registered owner of land parcel Mutithi/Strip/77 before subdividing the same into land parcels Mutithi/Strip/468 and 469. She averred land parcel 469 was registered jointly in her name and Ngondi Gachoki's name and when he died his name was deleted and she became the sole registered owner. The Respondent denied she was a party to the proceedings before the Tribunal and was unaware of the same. She further averred the Appellants suit disclosed any cause of action and that it was in any event statute barred under Section 7 of the *Limitation of Actions Act*.
7. The Learned Trial Magistrate after reviewing the submissions in support of and against the Preliminary Objection taken, came to the conclusion that the Land Tribunal heard the matter and made a finding. It was her view that the Tribunal was a competent Court and the issues that were determined by the Tribunal are the same issues that were before her for determination. The Learned Trial Magistrate on that basis held the suit before her to be resjudicata and proceeded to strike out the suit.
8. The Appeal was argued by the parties by way of written submissions. The Appellants submitted that the Land Disputes Tribunal lacked the jurisdiction to deal with the matter in view of the provisions of Section 3(1) the Land Disputes Tribunal *Act No. 18 of 1990* (now repealed) which provided as follows:-
  - 3(1) subject to this Act all cases of a Civil nature involving a dispute as to:-



- a. The division of, or the determination of boundaries to land, including land held in common:-
  - b. A claim to occupy or work land; or
  - c. Trespass to land, shall be held and the determination by a Tribunal established under Section 4.
9. The Appellants Counsel submitted the Tribunal had no jurisdiction to deal with issues relating to trust that the Appellants pleaded in the suit before the Trial Court and further argued whether or not a trust, existed was a matter of evidence and the burden to prove a trust lay on the person who sought to rely on it. To the extent that the Tribunal lacked the jurisdiction to deal with issues of trust and/or title of land as it did, Counsel argued it was not a competent Court and hence the doctrine of resjudicata was inapplicable. The Appellants relied on the Case of Stephen Ntokoiwuan Koikai -vs- Raphael Lekisho Koikai (2007) eKLR and Damaris Kondoro –vs- Gachanja Gitere & Another (2005) eKLR in support of her submissions.
  10. The Respondent for her part submitted that the Land Disputes Tribunal had determined all the issues the Appellant had brought a fresh in the suit before the Lower Court. She argued the Tribunal’s decision that was adopted by the Court on 24<sup>th</sup> September 2002 was not appealed against, set aside and/or reviewed. The Respondent argued the suit instituted before the Lower Court was resjudicata and placed reliance on the case of Njangu –vs- Wambugu & Another (Nairobi HCCC No. 234 of 1991) where Kuloba, J stated:-
 

“If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of doctrine of resjudicata---”
  11. The Respondent further placed reliance on the Case of Judith Gathoni Willy –vs- George Kihara Michuki & 2 Others (2010) eKLR and the case of Pangea Holdings LLC & Another –vs- Hacienda Development Ltd & 2 Others (2020) eKLR to support her submissions on the issue of resjudicata.
  12. Additionally, the Respondent submitted that the Appellants suit before the Lower Court was statute barred. The Respondent argued that the Appellants through their pleadings admitted and acknowledged the transaction that resulted in the transfer of the suit land to the Respondent occurred in 1996 yet the Appellants filed the suit in 2022. The Respondent contended that the Limitation period of 12 years under the *Limitation of Actions Act* had lapsed and hence the Appellants were non suited.
  13. I have reviewed the record of Appeal and have considered the Preliminary Objection that gave rise to the impugned Ruling. This Court being an Appellate Court of first instance is obligated to consider and re evaluate the evidence and material that was before the Learned Trial Magistrate at the time she made the Ruling on the Preliminary Objection to satisfy itself that the Ruling/decision of the Learned Trial Magistrate was justified. This was in keeping with the principle established by the Court of Appeal in the Case of Selle & Another –vs- East African Motor Boat & Others (1968) EA 123.
  14. The Respondent took the Preliminary Objection predicated on two grounds; firstly, that the suit was resjudicata owing to the fact that there had been a Tribunal award that was filed in Court and endorsed by Wang’uru Court vide Arbitration Case No. 19 of 2002, and secondly, that the suit was barred by statute of *Limitation of Actions Act*, as it was brought after the Limitation period had expired. The



Preliminary Objection was in my view on pure points of Law and in that regard satisfied the threshold established in the Case of Mukisa Bisquits –vs- Westend Distributors Ltd (1969)EA 696 as to what constituted a Preliminary Objection.

15. The issue for determination in this Appeal is whether the Respondent established the suit instituted by the Appellants was res judicata and/or was statute barred on account of the *Limitation of Actions Act* Cap 22 Laws of Kenya. It was the Respondents position that there was a previous suit involving the same parties vide Wang’uru PM Arbitration No. 19 of 2002 where the award of Wang’uru Disputes Tribunal was endorsed on 23<sup>rd</sup> September 2002. The award endorsed by the Magistrates Court was to the effect that land parcels Mutithi/Strip/468 and 469 be combined and the resultant portion be sub-divided as follows:-Ngondi Gachoki – 2 ½ Acres Gladys Warutui – 2 ½ Acres Eunice Wanoi – 2 ½ Acres Pauline Njeri – 2 ½ Acres.

The Disputes Tribunal without doubt acted without jurisdiction as they went outside their mandate as was prescribed under Section 3(1) of the Land Disputes Tribunal Act, 1990. The decision was ultravires and null and void ab initio and there was in effect no decision that was capable of endorsement by the Court. The Appellants have argued the Disputes Tribunal was not a competent Court and hence the res judicata doctrine could not be applicable to its decision. Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which embodies the resjudicata doctrine provides thus:-

7. Resjudicata

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.

16. The Appellants brought the case before the Tribunal against their late husband because he had subdivided their family land and caused one portion parcel 469 to be transferred to the joint names of the Respondent (youngest wife) and himself. The Respondent was not a direct party before the Tribunal but the decision they made affected her. The Respondent acknowledges that decision and it is the decision that she avers rendered the suit by the Appellants before the Lower Court resjudicata. The decision was never implemented and one wonders how it can be deemed resjudicata yet it was never acted upon and or implemented. The non execution and the Tribunal’s lack of jurisdiction to make the award in essence means there really was no decision capable of being relied upon to plead resjudicata.

Munyao, J faced with a somewhat similar situation as in the present case in the case of Vincent Kipsongok Rotich –vs Orphah Jelagat Ngelechei (2014) eKLR where there had been a Tribunal decision rendered without jurisdiction and a plea of resjudicata was raised in the subsequent suit before him stated as follows at paragraphs 18, 19 and 20 of the Ruling delivered by him on 23<sup>rd</sup> April, 2014.

18. It will be seen that the jurisdiction of the Tribunal was restricted to hearing disputes touching on the determination of boundaries, claims to occupy or work land, or claims of trespass to land. It was not within the mandate of the tribunal to hear disputes touching on ownership of land. The decision of the tribunal touched on ownership of land. The decision may not have been nullified but it is no doubt one of the issues in this suit.
19. A more or less similar scenario, to that before me emerged in the case of Stephen Ntokolwuan Koikai –vs- Raphael Lekishon Koikai, Nakuru HCCC No. 111 of 2007 (2007) eKLR. In the matter the Plaintiff filed suit seeking orders that he is entitled to a land parcel CIA-Mara/Ololunga/3492. The Defendant raised a Preliminary Objection that the suit was res judicata as



the matter had been adjudicated by the Land Disputes Tribunal and a decree issued which had not been set aside. The Court (Kimaru J) did not buy this argument. He held that the tribunal was not a “competent Court” whose decision could attract the application of the doctrine of res judicata in a subsequent suit.

20. I have no doubt in my mind that the Land Dispute Tribunal, in the circumstances of this case delved into a matter in which it had no jurisdiction. That decision was rendered by a Court that was not a “competent Court” and the decision and all subsequent proceedings, are prima facie a nullity. This subsequent suit having been filed in a Court of competent jurisdiction, cannot be res judicata.
17. I agree with the sentiments expressed by my brother Hon. Justice Munyao in the above referenced matter. To the extent that the Tribunal lacked the jurisdiction to deal with the issue of ownership as they did, meant that whatever decision they reached was null and void abinitio. They were not a “competent Court” within the context of Section 7 of the *Civil Procedure Act* and the doctrine of res judicata was not applicable in as far as their decision was concerned. The Court of Appeal in the case of Phoenix of E. A Assurance Ltd –vs- S. M. Thiga T/a Newspaper Service (2019) eKLR held that a suit filed before a Court devoid of jurisdiction was a nullity abinitio and was not transferable to another Court and that jurisdiction could not be conferred by consent and ultimately any orders emanating from such a suit are null and void. The Court of Appeal further held if a suit is filed before a Court bereft of jurisdiction the principle encapsulated in the time honoured locus classicus case of Macfoy – vs- United Africa Co. Ltd (1961) 3 All ER 1169 applies. In the case Lord Denning stated thus:-

“If an act is void, then it is in law a nullity. It is not bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
18. The proceedings before the Land Disputes Tribunal were void but since their decision was never implemented, it is as if there never was any such proceedings. The decision by the Tribunal was ineffectual and invalid and was of no consequence.
19. The Appellants claim as against the Respondent is founded on trust. Claims predicated on trust are not time bound and maybe brought at any time. The *Limitation of Actions Act*, Cap 22 Laws of Kenya has no application to claims based on trust. The Appellants suit thereof to the extent it is based on trust is not statute barred. The Appellants shall at the trial have the burden to prove trust as against the Respondent. It is to be noted that customary trust under Section 28 of the *Land Registration Act*, 2012 is an overriding interest that does not require to be noted in the title register. Where such trust is proved, any registration in the register would be deemed to be subject to such trust.
20. Upon consideration and evaluation of the Record of Appeal and the parties submissions, it is my determination that the Appeal has merit and I allow the same. The Ruling by the Learned Principal Magistrate is set aside and the suit is reinstated and ordered to be heard before any other Magistrate with jurisdiction other than Hon. Cheruto C. Kipkorir.
21. Each party shall bear their own costs of the Appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**J. M. MUTUNGI**



