



REPUBLIC OF KENYA



**Waita & another v Njiraini & another (Land Case E007 of 2023)  
[2024] KEELC 5777 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5777 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
LAND CASE E007 OF 2023  
JM MUTUNGI, J  
JULY 31, 2024**

**BETWEEN**

**MARY WARUGURU WAITA ..... 1<sup>ST</sup> PLAINTIFF**

**LUCY MSIGO WAITA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN KARIMI NJIRAINI ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN MBAKI WAITA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling relates to the Applicant’s Notice of Motion dated 19<sup>th</sup> October 2023 seeking the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of Mombasa High Court of Kenya Succession Cause No. 92 of 1997, In the Matter of the Estate of Francis Waita Mbaki (deceased).
  3. The costs of this Application be awarded to the provided.
2. The Motion is predicated on the Affidavit of John Karimi Njiraini of even date, where he depones that he was a legitimate buyer of the suit property KIINE/GACHARO/395 which property was one of the assets owned by the late Francis Waita Mbaki (deceased), and the sale was executed through a mutual agreement between him and the Estate Administrators appointed by the Mombasa High Court in Succession Cause No. 92 of 1997. Mr. Njiraini claimed that he had been in continuous possession of the property since February 2009 and has not received any communication from the Administrators annulling the agreement or demanding that he vacates from the property.



3. The Applicant averred that he lodged a caveat against the suit property and filed an application in the Mombasa High Court, Succession Cause No. 92 of 1997, seeking, among other things, a declaration that the property had been sold to him and did not constitute part of the deceased's estate. The Applicant further stated the current suit was initiated by the Plaintiffs without disclosing the ongoing case in another Court of equal jurisdiction, and without disclosing to the Court the status of the succession proceedings in Succession Cause No. 92 of 1997. He averred that this situation could lead to contradictory decisions of two Courts of concurrent jurisdiction handling a matter involving the same subject matter and hence the necessity for an order staying proceedings in the instant matter.
4. In response, the 1<sup>st</sup> Respondent, with the authority of the 2<sup>nd</sup> Respondent, filed a Replying Affidavit in opposition to the application. She averred that the application should be struck out because it was allegedly legally flawed, malicious, and intended to unduly prolong the Judicial process in the instant matter. The Respondent argued that the Applicant had been misguided into submitting an application for property restriction and ownership in a succession cause and further contended that the matters raised in the succession case application, such as the validity and inquiry of a sale agreement and property ownership, fall within the jurisdiction of the ELC Court. The Respondents were of the view that the Applicant should have brought their claim to this Court instead of in the succession case. The Respondent accused the Applicant of using the succession case application as a delay tactic and called for the Applicant's application to be struck out, emphasizing that the Applicant should not be allowed to forum shop.
5. The application was argued by way of written submissions. The Applicant filed his written submissions on 28<sup>th</sup> March, 2024, while the Respondents filed theirs on 3<sup>rd</sup> April, 2024. The Applicant argued the current matter was sub judice, pointing out that there was an ongoing application before the Mombasa High Court (Succession Cause No. 92 of 1997, In the Matter of the Estate of Francis Waita Mbaki, deceased), which sought to determine whether the suit property was part of the deceased's estate. He argued that the application in the Succession case was essentially seeking to resolve the same issue of ownership of the suit property as in the present suit. The Applicant expressed concern that conflicting decisions might be reached by the two Courts and urged the Court to allow the application and stay the present suit pending the hearing and determination of the application before the High Court in Mombasa. The Applicant placed reliance in the Cases of *John Mwashigadi Mwakisha v. Housing Finance Company Limited* (2021) eKLR, *Barclays Bank of Kenya Ltd v. Elizabeth Agidza & 2 Others* (2012) eKLR, and *Abdulkadir A. Khalif v. Principal Secretary Ministry of Lands and Physical Planning & 6 Others* (2018) eKLR to support his submissions.
6. The Respondents contended the instant suit was different from the succession cause in Mombasa. They contended the instant suit inter alia, was challenging the alleged sale of the suit property to the 1<sup>st</sup> Defendant, and sought to have the 1<sup>st</sup> Defendant restrained from interfering with the property and hence concerned the ownership of the property in question. In contrast, the succession cause in Mombasa aims to determine the beneficiaries and distribution of the deceased's estate. The Respondents contended that the succession Court lacked jurisdiction to deal with disputes of ownership as that is the preserve of the ELC Court. In the submissions, the Respondents Counsel stated that the Applicant's application in the succession cause was dismissed on 9<sup>th</sup> April 2024 though no evidence was provided. The Respondents placed reliance in support of their submissions on the case *Priscilla Ndubi & Zipporah Mutiga v Gerishon Mbui*, Meru Succession Cause No. 720 of 2013, and the Case of Machakos ELC Pet No. 6 of 2013 *Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others* (2013) eKLR.



## Analysis and Determination

7. Having reviewed and considered the Applicant's Notice of Motion, the Replying Affidavit and the written submissions of the parties, the issue to determine is whether the Applicant has made out a case to justify the Court to make an order staying the instant suit pending the determination of the succession cause pending before the Mombasa High Court as sought by the Applicant.
8. The existence of two suits involving the suit property is not disputed. From the material placed before the Court by the 1<sup>st</sup> Defendant/Applicant, the primary ground upon which their application is predicated is that the matter herein is subjudice owing to a caveat and an application that he has filed in Mombasa High Court Succession Cause No. 92 of 1997. The subjudice Rule or rather Principle is anchored under the provisions of Section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, which provides;

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same Court or any other Court having jurisdiction in Kenya to grant the relief claimed.”
9. In civil litigation, the importance of this principle cannot be overstated. It helps to prevent Courts of concurrent jurisdiction from simultaneously handling two parallel litigations involving the same cause of action. Doing so minimizes the risk of contradictory judgments by two different Courts concerning the same subject matter. This principle also plays a crucial role in avoiding the unnecessary waste of time and resources for both the courts and the parties involved, thus aligning with the Courts' overarching objective of administering Justice in an expedient, efficient and cost effective manner.
10. The fundamental test in the application of the doctrine is whether, on a final decision in the previous suit, such decision would operate as res judicata in the subsequent suit. In order for Section 6 of the *Civil Procedure Act* to be applicable, there must be two or more suits or proceedings that are alive as a starting point as was held in the Case of *Republic v Commissioner of Domestic Taxes: Panalphina Airflo Limited (Ex-parte)* 2019 eKLR, where the court stated;

“For the doctrine of sub-judice to apply, the following principles ought to be present: -

  - a. There must exist two or more suits filed consecutively:
  - (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
11. It is not in dispute that there is a pending Case, Succession Cause No. 92 of 1997, in Mombasa High Court. The Respondents claimed that the application before the Succession Court had been dismissed and the file had been subsequently closed, but they did not provide any proof of the same and hence nothing turns on that assertion.
12. The Respondents have pleaded that the primary duty of the Probate Court, in this case, the High Court at Mombasa, is to distribute the deceased's estate to the rightful beneficiaries. Consequently, the laws regulating the distribution of the deceased estate dictate that property must be identified, and



where issues on the ownership of the estate property are raised in a succession cause, they must be resolved before such property is distributed.

13. Rule 41(3) of the [Probate and Administration Rules](#) provides that such claims should be determined before confirmation and provides as follows;

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the [Civil Procedure Rules](#) and may thereupon, subject to the proviso to Section 71 (2) of the Act, proceed to confirm the Grant.

13. In the case where there is ownership dispute involving the property belonging to a deceased person and a third party who is not a beneficiary, the practice is for the ownership dispute to be determined outside the succession Court and for the Succession Court to be furnished the determination of the Court that determined the issue of the disputed ownership. In the Case of [Priscilla Ndubi & Zipporah Mutiga -v- Gerishon Gatobu \(in re Estate of Julius Ndubi Jawan \(deceased\)\)](#) (2018) eKLR Gikonyo, J held that where there was such a dispute, the property is set aside to await determination under Order 37 of the [Civil Procedure Rules](#) under Rule 41(3) of the [Probate and Administration Rules](#) (reproduced herein above). The Judge in the case under paragraph 16 of his Judgment stated thus:-

16. For better appreciation of the effects of the determination of ownership under Order 37 of the Civil Procedure Rules on a Succession Cause and the relationship between the two proceedings, see Musyoka, J in [re Estate of Stone Kathuli Muinde \(deceased\)](#) (2016) eKLR.

That:-

“----- if a decree is obtained in such suit in favour of the Claimant then such decree should be presented to the Probate Court in the Succession Cause so that, that Court can give effect to it.”

14. There is no doubt that this Court is seized with the jurisdiction to determine ownership of the suit property. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under Article 162(2) (b) of the [Constitution](#) of Kenya, 2010. Further, Section 13 of the [Environment and Land Court Act](#) further provides for the jurisdiction of the Court as follows:-

“(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.”

15. In the Case of *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, the Applicants in the summons for revocation of a grant were claiming that the deceased held the suit land in trust for them, Musyoka J expressed himself as relates to how the question could be resolved: -

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts (Emphasize added). It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this Court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only path legally open to the Applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

16. In this regard, it was further explained when a matter is best suited for a succession cause and when it should be referred to another Court with concurrent jurisdiction. In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, the Court held 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 the 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 are 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 (emphasis added).

*The Probate and Administration Rules* recognize that, and that should explain the provision in Rule 41(3). 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 (emphasize added). 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 (emphasize added). The interventions by that court are limited to what I have stated above."

17. The Environment and Land Court is the appropriate venue for addressing issues related to land use, occupation, and ownership, as well as cases involving the estate of a deceased person and third-party interests. It's important to note that while similar issues may arise in the Probate Court, such cases cannot be considered sub judice. This is because the Probate Court's jurisdiction is limited to the collection and distribution of the deceased estate and does not encompass decisions regarding property ownership. Even if the Probate Court were to address the question of whether the suit property forms part of the deceased estate, it would not have jurisdiction to address the issues raised in this suit. Therefore, this Court would still be required to make a determination of the issues raised in this suit. In my view, the best course of action would be to suspend the inclusion of the suit property in the distribution process until this suit is resolved. Consequently, the Applicant's motion lacks merit and is dismissed with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

