



**Gichobi (Suing on Behalf of the Estate of Simon Gichobi Gachoki alias Ngagu Gachoki) v Nyaga & another (Environment & Land Case E024 of 2023) [2024] KEELC 5320 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5320 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE E024 OF 2023**

**JM MUTUNGI, J**

**JULY 18, 2024**

**BETWEEN**

**PRISCILLA WANGECI GICHOBI (SUING ON BEHALF OF THE ESTATE OF SIMON GICHOBI GACHOKI ALIAS NGAGU GACHOKI) ..... APPLICANT**

**AND**

**JANET WAKARIA NYAGA ..... 1<sup>ST</sup> RESPONDENT**

**JANET WAKABARI GICHOKI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of the Respondents' Notice of Preliminary Objection dated 15<sup>th</sup> February 2024 seeking to strike out the Applicant's Complaint and Notice of Motion dated 30<sup>th</sup> October 2023, on the grounds:
  1. All the issues raised have been determined by a court of competent jurisdiction via Gichugu Succession Cause No. 73/2018; hence, this suit is res-judicata.
  2. No appeal or application for review has been filed against the decision in Gichugu Succession Cause No. 73/2018.
  3. This Honourable Court lacks the requisite jurisdiction to hear and determine the suit.
2. To contextualise the matter a brief background of the matter is appropriate. This suit was instituted by way of a Complaint on the 30<sup>th</sup> October 2023 filed simultaneously with a Notice of Motion of even date, under a Certificate of Urgency. The Notice of Motion sought for orders as follows:
  1. Spent



2. That pending the hearing and determination of this Application inter parties, an order of stay of proceedings of succession cause 73 of 2018 be issued.
  3. That pending hearing and determination of the main suit an order of stay of proceedings of succession cause 73 of 2018 be issued.
  4. That pending the hearing and determination of this Application inter-parties, an order of injunction be issued restraining the Respondent by themselves, their employees, servants and agents from wasting, constructing on, alienating or otherwise interfering with the Land Parcel Number Kabare/Kiritine/604 measuring 2.428 HA.
  5. That pending the hearing and determination of the suit an order of injunction be issued restraining the Plaintiff/Respondent by themselves, their employees, servants and agents from wasting, constructing on, alienating or otherwise interfering with the Land Parcel Kabare/ Kiritine/604 measuring 2.428 HA.
  6. That the Court do issue any further orders that may be appropriate to further the ends of justice.
  7. That the costs of this Application be provided for.
3. The Applicant's motion was predicated on the annexed affidavit sworn by Priscillah Wangeci Gichobi, who was the widow of Simon Gichobi Gachoki, alias Ngagu Gachoki. In her affidavit, she deponed the Respondents were her Sisters-in-law and they (the Respondents) were laying claim of ownership of land parcel as LR Kabare/Kiritine/604 (suit property) which belonged to her late husband. She maintained that Simon Gichobi Gachoki (deceased) was the registered owner of the suit land and that she and other beneficiaries had resided on the disputed land and that following the death of her husband, she initiated succession proceedings vide Gichugu Principal Magistrate's Court succession cause No. 73 of 2018, where she was issued Letters of Administration of her deceased husband's estate. The Grant was however later revoked following an application by the respondents, who argued that the land in question rightfully belonged to their father, Ngagu Gachoki.
  4. Priscillah Wangeci Gichobi the Applicant contended that her father-in-law passed away in 1963, which was long before the title deed to the suit land was issued to her husband in 1993. She contended her late husband was the rightful owner of the suit property. The Applicant was dissatisfied by the decision of the Lower Court that the suit land belonged to her father-in-law and consequently the revocation of the Grant of Letters of Administration issued to her in respect of her late husband's estate. The Applicant argued that the decision was flawed, particularly because her father-in-law was not buried on the contested land, which she stated ought to have influenced the court's decision. Moreover, the Applicant challenged the lower Court's jurisdiction over the matter, asserting that land ownership issues fell exclusively within the jurisdiction of the environment and land Court domain.
  5. Through her motion, the Applicant sought this Court's intervention to rectify what she viewed as a miscarriage of justice by the lower court, fearing that the estate's beneficiaries, including herself, would lose their inheritance if the decision was not overturned.
  6. The Respondents entered appearance and filed a Notice of Preliminary Objection, a Defence, and a Replying Affidavit. In the Replying Affidavit, they averred that all issues raised by the Applicant in the present suit were previously addressed in Gichugu Succession Cause No. 73 of 2018. They claimed that the Lower Court confirmed the disputed land belonged to their father, Ngagu Gachoki, and recognized them as his estate's beneficiaries. They accused the Applicant of clandestinely and deceitfully initiating Succession Cause No. 73 of 2018. The Respondents argued the Applicant misrepresented herself as



Ngagu Gachoki's wife, whereas infact Ngagu Gachoki was their father. They acknowledged having filed the application for the revocation of the Grant, which the Lower Court upheld, revoking the Letters of Administration issued to the Applicant. They reiterated the Court's decision that the land rightfully belonged to their father and that the Grant the Applicant had obtained before the Revocation was fraudulent and was procured under false representations.

7. The Respondents contended the Gichugu Magistrates was competent and had jurisdiction to deal with the matter before it and that the Applicant had neither sought a Review nor appealed the Lower Court's decision. It was the Respondents contention that the present suit was resjudicata.
8. The Court, on 21st February 2024, gave directions that the Preliminary Objection be disposed of first and that it be canvassed by way of written submissions. The respondents filed their written submissions on 13<sup>th</sup> March 2024, but the Applicant had not filed any submissions as at 6<sup>th</sup> May 2024 when the Court reserved the Ruling for delivery on 18<sup>th</sup> July 2024.
9. The issues that arise for determination in regard to the Respondents' Notice of Preliminary Objection is Whether the Court lacks jurisdiction to entertain the matter on the basis that there have been previous proceedings in Magistrate's Court Succession Cause Number 73 of 2018 between the same parties where similar issues arose and were determined which rendered the instant suit res judicata.
10. The Court of Appeal in the Case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 established the threshold for determining what would constitute a valid Preliminary Objection. A Preliminary Objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence is required to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the Mukisa Biscuit Case (supra) Law, JA stated as follow: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 the arbitration.”

11. In the present matter, the respondents have hinged their Preliminary Objection on the fact that the Applicant's cause of action has been heard and determined in another suit involving the same subject matter and the same parties and is thus Res Judicata. The question of whether or not the Applicant's suit is Res Judicata goes to the jurisdiction of the Court to entertain the suit. If the suit is Res Judicata, then the Court lacks the jurisdiction to entertain the same. If the Court were to go ahead and adjudicate the suit when it lacked jurisdiction, its verdict would be null and void.
12. The substantive law on Res Judicata is codified in Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides that:

“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”.



The Black's law Dictionary 10<sup>th</sup> edition defines "res judicata" as

"An issue that has been definitely settled by Judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

Steve Ouma, in A Commentary on the *Civil Procedure Act* Cap 21, Second Edition at page 38 has explained Section 7 to mean:

"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."

13. The doctrine of res judicata is supported by two primary rationales. Firstly, it recognizes the undue hardship that would befall an individual forced to litigate the same cause more than once, deeming such a situation undesirable. Secondly, it aligns with the public interest in ensuring that litigation has a definitive conclusion, preventing perpetual legal disputes. At the core of every suit is the fundamental principle that it must be based on a unique cause of action. Consequently, if a lawsuit is initiated based on the same cause of action as a previously adjudicated suit, it is deemed invalid and cannot proceed.
14. In the Case of Kennedy Mokuia Ongiri Versus John Nyasende Mosloma & Florence Nyamoita Nyasende (2022) eKLR, the Court held that:-
  - a. ...in order therefore to decide as to whether an issue in a subsequent Application is res judicata, a Court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant application to ascertain;
  - a. what issues were really determined in the previous application;
  - b. whether they are the same in the subsequent application and were covered by the decision.
  - c. whether the parties are the same or are litigating under the same title and that the previous application was determined by a Court of competent jurisdiction.
15. In the Case of Njangu Versus Wambugu and another Nairobi HCCC No. 2340 of 1991 (Unreported), Kuloba J, stated as follows:-

'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 the doctrine of res judicata.....
16. These principles were restated by Hon. Ondunga J (as he then was) in the Case of Republic – Vs – Attorney General and Another Exparte James Alfred Koroso [2013] eKLR, where he expressed himself thus on the issue of access to Justice: -

"Access to Justice cannot be said to have been ensured when persons in whose favour Judgments have been decreed by Courts or Tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."



17. The Learned Judge in the Case of Kennedy Mokuu Ongiri (Supra) further held that
- “...Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity.”
18. I have considered the pleadings by the parties, the respondents’ submissions and the parties’ annexures. There is an undeniable ruling in the Gichugu Magistrate’s Court relating to Succession Cause No. 73 of 2018, where the Respondents herein as Applicants in the succession cause applied for the revocation of Grant issued to the Applicant herein. In their application for revocation in the Gichugu Magistrate’s Succession Cause the Respondents herein prayed for the following orders:-
1. Prohibitory orders on LR No. Kabare/Kiritine/604 pending the hearing of the application for revocation of grant;
  2. Stay of sale, sub division, transfer, dealing or any alteration of Kabare/Kiritine/604 pending the hearing of the application for revocation of Grant.
  3. Revocation and/or annulment of grant of letters of administration issued to Priscillah Wangeci Gichobi and John Munyanbu Njeru on 04/03/2020.
19. In deciding whether to issue the orders in question, the Learned Magistrate focused on three critical issues: firstly, whether Simon Gichobi Gachoki and Ngagu Gachoki refer to the same individual; secondly, the rightful ownership of LR Kabare/Kiritine/604, which lies at the core of this dispute; and thirdly, whether there was any fraud or concealment of material facts involved in the acquisition of the grant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. She found that Ngagu Gachoki was the name of the Respondents’ deceased father and not the Applicant’s husband. Regarding the ownership of the land in question, the Presiding Magistrate determined, “I conclude that the land identified as Kabare/Kiritine/604 was and continues to be owned by Ngagu Gachoki, who is the father of PW1, PW2, PW3, and the father-in-law of DW1.” These were definite and conclusive findings which the Applicant does not appear to have appealed against and/or sought review of.
20. The Applicant has filed the present suit, contending that the Lower Court was not vested with the requisite jurisdiction to adjudicate over the issue of ownership of the contested property. Through this suit, the Applicant seeks a declaration affirming that her husband, Simon Gichobi Gachoki, was the lawful registered owner of the property in question. Additionally, she seeks the issuance of a perpetual and permanent injunction restraining the Respondents, along with their agents or assigns, from asserting any claims over the property. Furthermore, the Applicant is seeking compensatory damages and the costs of this suit.
21. The matter before the Principal Magistrates Court at Gichugu was a succession cause where land parcel Number Kabare/Kiritine/604 was the subject matter. The Plaintiff/Applicant had obtained Grant of Letters of Administration to the estate of Ngagu Gachoki (deceased) who she had claimed was her husband. The Respondents got wind of it and they filed an application for the revocation of the Grant on the grounds that there had been concealment of material facts and principally that the land the subject matter belonged to their deceased late father and not to their brother, Simon Gichobi Gachoki (now deceased) who was the husband of the Plaintiff. The issue of whether the land parcel Kabare/Kiritine/604 formed part of the Applicant’s deceased husband estate was directly in issue and the Trial Magistrate had to decide who the owner was once the application for revocation was filed.



22. The Learned Resident Magistrate heard the application for revocation Viva Voce and in a detailed ruling delivered on 15/7/2022 held that land parcel number Kabare/Kiritine/604 belonged to the father-in-law of the Plaintiff and not her husband, and that the Respondents as daughters of the registered owner were entitled to inherit as beneficiaries of the deceased. The Trial Magistrate made final orders as follows:-
- a. The Grant of Letters of Administration made to Pricillah Wangechi Gichobi and John Munyambu Njeru on 04/03/2020 and confirmed on 24/03/2021 be and are hereby revoked.
  - b. Parties to agree on an Administrator(s) to move the Court appropriately for issue of fresh Letters of Administration over the estate.
  - c. Each party to bear their own costs of the application.
23. In the suit before this Court the Plaintiff inter alia prays for an order:-
- a. That the Plaintiff's husband Simon Gichobi Gachoki alias Ngagu Gachoki is the registered proprietor of land parcel No. Kabare/Kiritine/604 measuring 2.428 Ha.
24. The issue whether or not it was the Plaintiff's husband Simon Gichobi Gachoki, and/or his deceased father Ngagu Gachoki, who was also father to the Defendant/Respondents, who was the owner of land parcel No. Kabare/Kiritine/604 was directly in issue. The Court determined the land belonged to the Plaintiff's father-in-law and not to her husband. The Court was competent and had jurisdiction to determine the issue of ownership of the land the subject of the succession proceedings within the succession cause. Once the Court made that decision, any party dissatisfied with the determination had the option of either appealing the decision and/or seeking a review before the same Court. Those are the options the Plaintiff had but not to abandon the succession and to file a fresh suit before a different Court.
25. My consideration of the matter is that the present suit is both Resjudicata and subjudice in the sense that the issue of ownership that the Plaintiff is inviting the Court to determine was effectively determined before the Magistrate's Court. The suit is subjudice because the succession matter before the Magistrate's Court is yet to be concluded, the grant having been revoked. The parties were invited by the Lower Court to agree on who the Administrator(s) was to be for the matter to proceed.
26. In the final result, I find the Preliminary Objection to be well taken and meritorious. I uphold the same. The suit was instituted in abuse of the Court process and the same is hereby struck out in its entirety with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

