



**Kabugi v Macheru & 5 others (Environment & Land Case E016 of 2023)
[2024] KEELC 5995 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E016 OF 2023**

**JM MUTUNGI, J
SEPTEMBER 19, 2024**

BETWEEN

BETH WAITHERERO KABUGI PLAINTIFF

AND

MICHAEL MUNDIA MACHERU 1ST DEFENDANT

STEPHEN MUGO MUTAMBA 2ND DEFENDANT

GILLIAN RWAMBA GICHANGI 3RD DEFENDANT

**ADMINISTRATORS OF THE ESTATE OF STEPHEN MUGO
MUTAMBA 4TH DEFENDANT**

ATTORNEY GENERAL 5TH DEFENDANT

LAND REGISTRAR KERUGOYA 6TH DEFENDANT

RULING

1. Before me for determination is the 1st and 2nd Defendants Notice of Motion application dated 24th May, 2023. By the application the 1st and 2nd Defendants pray that the Plaintiff dated 21st March 2023 be struck out with costs and the costs of the application be provided for. The application is supported on the grounds set out on the body of the application as follows:-
 - a. The Court lacks pecuniary jurisdiction by virtue of Section 47 and 48 (1) of the [Law of Succession Act](#).
 - b. The Court lacks original jurisdiction by virtue of Section 50(1) of the [Law of Succession Act](#).
 - c. The suit is resjudicata by virtue of Section 7 of the [Civil Procedure Act](#).
 - d. The Plaintiff raises no reasonable cause of action in Law.



2. To contextualise the application, it is necessary to set out albeit briefly the background of the case. The Plaintiff instituted the instant suit vide a Plaint dated 21st March, 2023. Inter alia the Plaintiff sought a declaration that she was lawfully registered proprietor of land parcel number Gichugu/Settlement/4983 (“the suit property”); a permanent injunction against the 3rd Defendant; and a permanent order of inhibition barring any further dealings and/or transactions over the suit property. Alternatively the Plaintiff prayed for:-
 - i. Compensation;
 - ii. General damages;
 - iii. Any other relief or order the Lower Court may deem fit and just to grant.
3. The Plaintiff vide the Plaint pleaded that she purchased the suit property from the 1st and 2nd Defendants for the consideration of Kshs, 1,100,000/- after verifying that the suit property was registered in the 1st and 2nd Defendants names. The Plaintiff averred that all due process including obtaining the Land Control Board’s consent, payment of stamp duty, registration of transfer and issuance of title deed in the Plaintiffs name was adhered to and the Plaintiff was satisfied she had obtained a good title as a bonafide purchaser.
4. The Plaintiff stated she took possession of the suit land and continued in exclusive possession of the until January, 2023 when she was made aware that vide a Ruling delivered by Hon. G. K. Odhiambo, Resident Magistrate Gichugu on 27th November, 2019 in Gichugu PM’s Court Succession Cause No. 288 of 2016 (in the Estate of Stephen Mutamba – Deceased) all subdivisions and titles emanating from land parcel numbers Gichugu/Settlement/3636, 3635 and 3196 were cancelled and annulled and the original title restored to the deceased name. The Plaintiff averred that land parcel number Gichugu/Settlement/4983 having been a subdivision out of land parcel Gichugu/Settlement/3635 meant that her title was affected and she risked now being evicted if the order was executed.
5. The 1st and 2nd Defendants filed a statement of defence dated 24th May 2023. They denied they were parties in the succession cause No. 288 of 2016. The 1st and 2nd Defendants in their defence averred that this Court lacked jurisdiction by virtue of Section 47,48 and 50 of the *Law of Succession Act*, Cap 160 Laws of Kenya. The 1st and 2nd Defendants stated that they innocently and in good faith purchased the suit land from one James Ndegwa Mwangi for valuable consideration of Kshs 700,000/- before they sold the same land to the Plaintiff for the consideration of Kshs 1,100,000/-. They denied the suit raised any reasonable cause of action against them.
6. The Plaintiff filed a Replying Affidavit dated 26th January 2024 in opposition to the 1st and 2nd Defendants application. The Plaintiff contended that her suit raises triable issues to warrant the suit to proceed to trial. The Plaintiff pleaded that striking out of a suit should only be done as a last measure where a suit is so hopeless such that it cannot even be cured by amendment. The Plaintiff contended by the Plaint she seeks a declaration that she is the lawfully registered proprietor of the suit land having been an innocent purchaser for valuable consideration and without any notice of any defect in the title. The Plaintiff asserts that such issues could only be interrogated at the trial and urges the Court to permit the suit to proceed to trial to be heard on merits. The Plaintiff argues striking out of pleadings ought to be as a last result when not even an amendment could salvage the suit. The Plaintiff denied the suit is resjudicata stating that there has not been any previous litigation between the parties in the suit in which the issues raised in the instant suit have been determined.
7. The application was canvassed by way of written submissions. The 1st and 2nd Defendants filed their submissions dated 19th April, 2024 and the Plaintiff belatedly filed her submissions dated 16th August,



2024. I have reviewed the application and the Affidavit sworn in opposition and have considered the submissions made on behalf of the parties. The twin issues for determination are whether the Court has jurisdiction to entertain the suit having regard to the plea of resjudicata and lack of pecuniary and/or original jurisdiction; and secondly whether the suit ought to be struck out on account of failure to disclose a reasonable cause of action.

8. On the issue of jurisdiction the 1st and 2nd Defendants submission is that the suit ought to have been instituted before the Magistrate's Court at Gichugu since it had the pecuniary jurisdiction to handle the matter. The 1st and 2nd Defendants relied on the provisions of Section 26(3)(4) of the *Environment and Land Court Act* 2011 and Section 7(1) of the Magistrate's Court Act, 2015 which deal with the jurisdiction of the Magistrate's Court in as far as Environment and Land matters are concerned. The 1st and 2nd Defendants refer to Sections 11 and 12 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which direct where suits should be instituted. Section 11 of the *Civil Procedure Act* provides that every suit shall be instituted in the Court of the lowest grade competent to try it while Section 12 of the Act provides that suits involving property should be instituted in the Court within the local limits of whose jurisdiction the property is situated.
9. The 1st and 2nd Defendants argued it was the Magistrate's Court at Gichugu that had jurisdiction to handle the matter and not the ELC Court. To support their submissions, Counsel for the 1st and 2nd Defendants cited the Case of Phoenix of EA Assurance Company Ltd –vs- SM Thiga t/a Newspaper Service (2019) eKLR where the Court of Appeal stated thus:-

“ --- jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the Court seized of jurisdiction.

A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The Subordinate Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”

10. The Defendants counsel additionally referred the Court to the Case of Bank of Africa Kenya Ltd –vs- John Ndungu Gachara (2022) eKLR where the Court held:-

“ 21. The Magistrate's Court have jurisdiction under the Magistrates Court Act to exercise both Criminal and Civil Jurisdiction (see Sections 6 and 7 of the Act). The Civil jurisdiction of the Magistrates Courts is only limited by the pecuniary jurisdiction granted to each cadre of Magistrates. Under Section 26(3) of the *Environment and Land Court Act*, 2011, the Chief Justice is empowered to appoint certain Magistrates to preside over cases involving Environment and Land matters. Once appointed such a Magistrate while handling an Environment and Land related matter would only be limited by the value of the subject matter. The Preliminary Objection was not premised on the lack of pecuniary jurisdiction of the learned trial Magistrate.”

11. The 1st and 2nd Defendants further have submitted that the Gichugu Magistrate's Court in Succ. Cause No. 288 of 2016 dealt with the matter as a succession matter and rendered a Ruling which has not been reviewed, set aside and/or appealed against. The Defendants contended that the Magistrate's Court having exercised its jurisdiction in regard to the subject suit in a Succession matter and rendered a decision thereon, recourse lay to the High Court by way of Appeal under Section 50(1) of the *Law of Succession Act* which provides as follows:-



- (1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.
12. On the issue of jurisdiction of this Court to entertain the matter, the Court by virtue of Section 13(1) of the *Environment and Land Court Act*, 2011 is vested with both original and appellate jurisdiction. Section 11 of the *Civil Procedure Act* that provides suits should be initiated in the Court of the Lowest grade competent to try it does not in my view oust the jurisdiction of the ELC to hear and determine a suit where the value of the subject matter would otherwise fall under the Magistrate Courts pecuniary jurisdiction. Section 11 and 12 of the *Civil Procedure Act* in my view serve as administrative provisions to ensure suits are filed within the local limits whenever the Local Courts (Magistrates Courts) possess the pecuniary jurisdiction to handle such matters. That explains the provisions of Section 18(1) of the *Civil Procedure Act* which empowers the High Court (in this case the ELC) on application by any party or on its own motion to withdraw and transfer any suit pending before it to any Subordinate Court with competence to try and/or dispose of the same. Section 18(1) of the *Civil Procedure Act* provides:-
- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- iv. retransfer the same for trial or disposal to the court from which it was withdrawn.
13. In the present matter therefore the ELC could not be said to be without jurisdiction on account of the pecuniary jurisdiction of the subject matter. The 1st and 2nd Defendants had the option to seek the transfer of the matter, to the Subordinate Court that had jurisdiction to try and dispose of the matter.
14. The second jurisdictional challenge that the 1st and 2nd Defendants raised against the Plaintiffs suit is that the Gichugu Magistrate’s Court in succession cause No. 288 of 2016 made valid orders whose effect was to annul the titles that emanated from the illegal dealings relating to the assets of the deceased estate. The Magistrate’s Court in annulling and cancelling the resultant titles in regard to land parcels Gichugu/Settlement/Scheme/3636, 3635 and 3196 held that the transfers had been irregularly and illegally effected. The Learned Trial Magistrate in the succession cause held as follows:-

“---- The Court does find that Julius Kariuki Mugo, Susan Wambui Kanyi and Asunda Wanjiru Mugo had no authority to transfer or dispose land parcel Gichugu/Settlement/Scheme 3636, 3635 and 3196 before the confirmation of grant. The titles acquired by the Interested Party therefore cannot be afforded the protection of the Law as the whole registration processes was shrouded with illegalities. The sale to the Third Party herein of immovable property was done in contravention of the law. It amounted to a criminal activity



such transaction cannot be valid, and should not be upheld by the law. The subsequent transfers, subdivisions and registration touching on land parcel 3636, 3635 and 3196 are hereby declared null and void. The new titles issued in respect of land parcel 3636, 3635 and 3196 are hereby cancelled and the land do hereby revert back to the name of Mugo Stephen Mutamba the deceased herein.”

15. The net effect of the decision of the Gichugu Magistrate’s Court in the said Ruling was to declare any transfers, subdivisions and registrations in regard to land parcels 3636, 3635 and 3196 null and void. The Court also cancelled all the subsequent titles and reverted the land to the name of the deceased, Mugo Stephen Mutamba. The Ruling/decision by the trial Magistrate does not appear to have been challenged and hence remains in force and valid. This Court does not exercise jurisdiction over succession matters and cannot sit on appeal on any succession matter emanating from the Subordinate Court as such appeals lie to the High Court under Section 50(1) of the *Law of Succession Act*.
16. The Plaintiff admits the parcel of land Gichugu/Settlement/4983 that she lays claim to was a subdivision of land parcel Gichugu/Settlement/3635 which as per the Ruling in the succession case was cancelled and title of land parcel 3635 ordered to be reverted to the name of the deceased, Mugo Stephen Mutamba. The Plaintiff at the time she filed the instant suit, was aware of the existence of the Ruling/decision in Gichugu Succession Cause No. 288 of 2016 that had annulled and cancelled the title of the subdivision out of land parcel 3635 that she held being land parcel Gichugu/Settlement/4983. This decision having not been reviewed and/or set aside remained valid. As the Plaintiff was laying claim to land parcel Gichugu/Settlement/4983 whose title the Magistrate’s Court had annulled and cancelled, this Court would legally not properly entertain a claim of ownership of the parcel of land, the succession Court having determined the parcel of land constituted part of the assets of the estate of Mugo Stephen Mutamba (deceased). The Lower Court as observed, ordered cancellation of the title of the subdivision and reverted the original title of parcel 3635 to the name of the deceased for appropriate succession proceedings to determine the distribution of the deceased estate.
17. The Plaintiff if she felt affected and/or aggrieved by the decision in the Magistrate’s Court Succession Course No. 288 of 2016 ought to have applied to have the same set aside and/or reviewed so that she was joined as a party in the cause to ventilate her interest. The 1st and 2nd Defendants have argued that the matter is resjudicata having been determined by the Magistrate’s Court. The Plaintiff disagrees and submits the matter is not resjudicata. The Plaintiff’s Counsel in support of his submission relied on the Supreme Court decision in John Florence Maritime Services Ltd & Another –vs- C. C Transport and Infrastructure & 3 Others (2021) eKLR where the Court stated thus:-

“We restate the elements that must be proven before a Court may arrive at the conclusion that a matter is resjudicata for resjudicata 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 second action identical parties, subject matter and cause of action.”



18. The Plaintiff argues the legal issues in the succession cause was different from the legal issue in the instant suit where the question for determination is whether the Plaintiff was the lawful proprietor of land parcel No. Gichugu/Settlement/4983.
19. In the face of the Ruling by the Gichugu Magistrate's Court the question of who was the lawful proprietor of land parcel No. Gichugu/Settlement/4983 cannot arise in the present suit since the Magistrate's Court had declared the title to parcel 4983 a nullity and ordered its cancellation. As long as the said Magistrate's Court remains intact, this Court cannot lawfully inquire into the validity or otherwise of the title to land parcel No. Gichugu/Settlement/4983 as the Lower Court has pronounced itself on the same question and the matter is not before this Court in exercise of its appellate jurisdiction, which however it could also not exercise as the Ruling arose out of succession proceedings in regard to which this Court has no jurisdiction.
20. While the suit may not be resjudicata since the Plaintiff was not a party in the Lower Court succession cause, and also raises different issues of Law, the Plaintiff is nonetheless none suited as the Magistrate's Court made a final order affecting the land the subject matter of the instant suit. Without the order emanating from the succession cause being set aside, the Plaintiff cannot sustain the suit in the form it is presented.
21. The Plaintiff has under prayers (d) and (e) prayed in the alternative for compensation and general damages but with respect, the pleadings as per the Plaint cannot support the alternative prayers. The Plaintiff may well be entitled to claim compensation from the persons who sold him the land but such claim is unsustainable in the instant suit. It is my determination that the Plaintiff's suit as against all the Defendants does not raise a reasonable cause of action. The suit is struck out with costs to the 1st and 2nd Defendants.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 19TH DAY OF SEPTEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

