



Mukunya & 3 others v Njari & another (Sued as the Administratrix and Administrator of the Estate of Peter Njari Kanyi alias Njari s/o Kanyi – Deceased) (Environment & Land Case 32 of 2014) [2024] KEELC 6808 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 32 OF 2014
JO OLOLA, J
OCTOBER 17, 2024**

BETWEEN

**JAMES MAINA MUKUNYA 1ST APPLICANT
MOSES WANJAU MUKUNYA 2ND APPLICANT
NYARUAI MUKUNYA 3RD APPLICANT
JOHNSON WANJOHI MUKUNYA 4TH APPLICANT**

AND

**DAMARIS MUTHONI NJARI 1ST RESPONDENT
CHRISTOPHER NGUNJIRI NJARI 2ND RESPONDENT
SUED AS THE ADMINISTRATRIX AND ADMINISTRATOR OF THE ESTATE
OF PETER NJARI KANYI ALIAS NJARI S/O KANYI – DECEASED**

RULING

1. By an Originating Summons dated 28th February 2014, the four (4) Applicants had asked the court to determine a number of issues listed as follows:
 1. Whether the deceased Peter Njari alias S/o Kanyi (deceased) was registered as the proprietor of the parcel of land LR. No. Aguthi/Mungaria/178 (hereinafter referred to as “the suit property”) subject to a customary trust in favour of Mukunya Kanyi (deceased) and his children, the applicants, to the extent of half share thereof;
 2. Whether the administration of the Estate of Peter Njari alias Njari S/o Kanyi (deceased) by the Respondents vide Nyeri High Court Succession Cause No. 919 of 2009 should be subject to the said customary trust;



3. Whether the Applicants are beneficiaries of half share of the suit land pursuant to the pleaded customary trust;
 4. Whether half share of the suit land should be isolated from the estate of Peter Njari Kanyi alias Njari S/o Kanyi (deceased) in the pending succession proceedings in relation thereto for the benefit of the Applicants;
 5. Whether the pleaded customary trust should be determined accordingly; and
 6. Who should bear the costs of the suit.
2. The Originating Summons is supported by an affidavit sworn by James Maina Mukunya (the 1st Applicant) on behalf of himself and the other applicants. The 1st Applicant avers that the suit property is registered in the name of Peter Mukunya Kanyi alias Njari S/o Kanyi who is deceased. The Applicants further aver that the registered proprietor of the suit property was a brother to the Applicants' late father Mukunya Kanyi and that the two were the only sons of the original owner of the land, one Kanyi Nduini.
 3. The Applicants further avers that the said Kanyi Nduini had two wives and the deceased was registered to hold the suit land in trust for the two houses in equal shares. The applicants aver further that while the registered proprietor passed away on 17th June 1974, the Respondents respected the use of the land by the Applicants' father until sometime in the year 2009 when their father was issued with a notice to vacate the land.
 4. It is the Applicants' case that the notice to vacate was the culmination of succession proceedings undertaken in Nyeri High Court Succession Cause No. 919 of 2009 which had been initiated by the Respondents. Upon learning of the Succession Cause, the applicants' father instituted Nyeri HCCC No. 38 of 2010 (OS) suing one of the sons of the registered proprietor. The Applicants' father however passed on before the suit could be heard and the same subsequently abated.
 5. The two Respondents are opposed to the determination of the issues sought in the Originating Summons. In a Replying Affidavit sworn on their behalf on 22nd July 2018 by Christopher Ngunjiri Ngari (the 2nd Respondent) the Respondents concede that the registered proprietor was a step brother to the Applicants' father.
 6. The 2nd Respondents avers that their grandfather caused LR. No. Aguthi/Mungaria/442 to be registered in the name Applicants' father Mukuny Kanyi as his eldest son to hold as a "Muramati" in trust for the other beneficiaries but the Applicants' father refused to perform his duty as required by the customs and he instead appropriated the property to himself and the Applicants who continue to reside thereon.
 7. The 2nd Respondent denies that the suit property belonged to their grandfather. Instead, they assert that the suit property was privately acquired by the 2nd Respondent's father. The Respondents further assert that the Applicants' father had brought a similar claim against the 2nd Respondent's father being Nyeri HCCC No. 38 of 2010 (OS) but the same was not prosecuted and abated after the death of the father to the Applicants.
 8. In addition to the Replying Affidavit and by way of a Notice of Preliminary Objection dated 17th November 2022, the Respondents object to the Applicants' suit on the grounds that the suit herein is *res judicata* Nyeri HCCC No. 38 of 2010 (OS) and an abuse of the court process as well as an attempt to reinstate the said Nyeri HCCC No. 38 of 2010 (OS).



9. Following directions given herein on 29th January 2024, it was agreed that the Originating Summons be disposed of first by way of written submissions. I have accordingly carefully perused the Notice of Preliminary Objection as well as the rival submissions placed before me by the Learned Advocates representing the parties.
10. By their Preliminary Objection filed herein, the Respondents object to the suit herein on account of the fact that the same is *res judicata* and an attempt to reinstate an earlier suit which had been filed by the father to the Applicants.
11. The doctrine of *res judicata* is captured at Section 7 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya as follows:

“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”
12. As the Court of Appeal stated in [The Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others](#) [2017] eKLR:

“For the bar of *res judicata* to be effectively raise and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:-

 - a. The suit or issue was directly and substantially in issue in the former suit;
 - b. That former suit was between the same parties or parties under whom they or any of them claim;
 - c. Those parties were litigating under the same title;
 - d. The issue was heard and finally determined in the former suit; and
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
13. In his Replying Affidavit filed herein on 25th July 2018, the 2nd Respondent has attached as annexure ‘A’ and ‘B’ a copy of both the Originating Summons and the Supporting Affidavit that were filed in he said Nyeri HCCC No. 38 of 2010. A perusal thereof reveals that one Mukunya Kanyi had sued one Godfrey Maina Njari for a determination of the following two issues:
 1. Whether registration of LR. No. Aguthi/Mungaria/178 was done in trust for the Plaintiff to the extent of half share thereof; and
 2. Who should bear the costs of the suit.
14. From the material placed before the court, it was not in dispute that Mukunya Kanyi who was the Plaintiff in the said Nyeri HCCC No. 38 of 2010 was the father of the five (5) Applicants herein. It was also not in dispute that Godfrey Maina Njari sued as then Defendant therein was the eldest son of the 1st Respondent and her husband Njari S/o Kanyi and a brother to the 2nd Respondent herein.
15. From a perusal of the pleadings herein, it was also clear to me that just as in the previous suit, the main issue in the instant suit relates to a determination on the issue of whether or not the said Njari S/o



Kanyi was registered as the proprietor of the suit property in trust for himself and his brother Mukunya Kanyi and by extension Mukunya Kanyi's children.

16. In their submission filed in response to the Notice of Preliminary Objection, the Applicants have asserted that in the previous suit, their father was seeking the determination of a pleaded trust as a beneficiary thereof. It is their submission that they are also claiming as beneficiaries sui juris with their own right of seeking a determination of the pleaded trust on their own and that's hence their claim is sui generis.
17. From the Supporting Affidavit filed by the Applicants, it was apparent that their father Mukunya Kanyi passed away on 12th May 2012 before the previous suit was concluded. That is evident from Paragraph 15 and 16 of Affidavit sworn by James Maina Mukunya as he avers as follows:
 15. That our late father had in the meantime filed a claim as in the instant suit vide Nyeri High Court Civil Case No. 38 of 2010 (OS) suing one of the sons of the deceased registered person Godfrey Maina Njari as he was not aware that anyone had been constituted as an administrator of the respective estate; and
 16. That our late father however died before hearing of the suit, which since abated.”
18. In matters where one party dies before a suit is concluded, Order 24 of the Civil Procedure Rules comprehensively outlines what ought to happen. In respect of the death of the Plaintiff, Order 24 Rule 3 provides as follows:
 1. Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or Plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.

Provided the court may, for good reason on application, extend the time.”
19. In addition, Order 24 Rule 7 provides for the effect of abatement or dismissal of suits as follows:

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 - (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
 - (2)
20. As was held in Laban Masinjila & 2 Others -sv- Joshua Andala Masinjila & 2 Others [2021] eKLR:

“The effect of abatement of a suit is that it brings proceedings against the deceased party to a close in the same way that a Judgment would. The finality is such that in terms of Order 24 Rule 7 (1) of the Civil Procedure Rules, no fresh suit can be brought on the same cause of action.”



21. In the matter herein, it was evident that instead of trying to revive the suit that had abated, the Applicants had waited some two (2) years and then instituted this fresh claim based on the very same cause of action. I was not in the circumstance herein persuaded that the Applicants herein were seeking a claim separate from that which their father had instituted in the year 2010.
22. In the premises, I am persuaded that the suit herein contravenes the doctrine of *res judicata* and that the same was filed in abuse of the court process.
23. Accordingly I find and hold that there is merit in the Notice of Preliminary Objection dated 17th November 2022. The Originating Summons dated 28th February 2014 is hereby struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17TH DAY OF OCTOBER, 2024.

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J. O. OLOLA

JUDGE

In the presence of:

No appearance for the Plaintiffs.

No appearance for the Defendants.

Court Assistant: Kendi.

