



Caribbean Contractors Co.Ltd & another v Kai & another (Environment and Land Appeal E035 of 2024) [2024] KEELC 13855 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E035 OF 2024
EK MAKORI, J
DECEMBER 16, 2024**

BETWEEN

CARIBBEAN CONTRACTORS CO.LTD 1ST APPELLANT

JULIUS MUZUNGU KABINA 2ND APPELLANT

AND

NYINGE KAI 1ST RESPONDENT

MWAMUYE MAKUPE MWABILA 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. D. Wasike (PM) issued on 23rd July 2024 in the Chief Magistrate's Court (CMELC NO: E104 OF 2023 at the Chief Magistrate's Court, Kilifi)

RULING

1. The Application dated 13th August 2024 by the Appellants seeks the following orders:
2. The Notice of Motion Application is premised on the grounds of the application's face and the Supporting Affidavit sworn on 13th August 2024 by Betty Chao. A rejoinder was filed on 29th October 2024 through a Replying Affidavit deposed by one Nyinge Kai, the 1st Respondent herein.
3. The Court directed the application to be canvassed through written submissions. I frame the issues for this Court's decision as whether to stay proceedings in Kilifi CMELC No. E104 of 2023 and who should bear the costs of these proceedings.
4. The Appellants aver that they have filed the present Appeal, which raises the issue of the Trial Court's Jurisdiction to hear and determine the suit before it. If the Appeal is successful and upholds the Appellant's Preliminary Objection on the point of Law, then all further proceedings in the Trial Magistrate's Court in the said Kilifi CMELC No: E104 OF 2023 will be rendered null and void. It is in the interest of justice and, in particular, the just determination of proceedings and efficient disposal of



the business of the Court that there be a stay of further proceedings in the said Kilifi CMELC No: E104 OF 2023 pending hearing and determination of the Appeal herein. The 1st and 2nd Respondents who are not beneficiaries of the suit property as per the determination in Malindi High Court Succession Cause No: 182 of 2016 in the matter of the Estate of Kabina Kai Mwachemba (Deceased) wherein Nyakundi J. confirmed the grant on 24th January 2019 and awarded the suit property to the 2nd Applicant and his siblings which grant has neither been revoked nor set aside.

5. The Appellants strongly assert that the Respondents filed the suit before the Trial Court without disclosing the material facts to the Trial Court and obtained ex-parte injunctive orders.
6. In their response to the said suit before the Trial Court, the Appellants disclosed the determination in the said Malindi High Court Succession Cause No: 182 of 2016 and raised the issue of res-judicata, which bars the filing of a fresh suit in another court over the same subject matter involving the same parties.
7. According to the Appellant, the cause of action, as pleaded by the 1st and 2nd Respondents in the Lower Court, is succession/ inheritance, which issue was determined by the High Court in the said Succession Cause. The filing of the suit before the lower Court when there is a determination by a Superior Court that has not been overturned or set aside, according to the Appellants, is an abuse of the Court process, which may lead to anarchy if unchecked. The appeal filed herein has the potential of completely and effectually determining the main suit pending trial in the Lower Court; hence, there is a need to stay the proceedings in the Lower Court to await the determination of the present appeal.
8. The Respondent believes that the appeal has no merit. The issue before the Trial Court was ownership and not succession, and the suit property was of value within the purview of the Magistrates Court.
9. The role of this Court at this point is crucial, as it involves re-evaluating the evidence and making its independent conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

10. In the Lower Court, the issue of res judicata was raised. The central theme of this appeal is that the Magistrate lacked jurisdiction to proceed further by dint of the doctrine of res judicata. It goes to attack the jurisdiction of the Trial Court. I must reckon it because the Court's jurisdiction is paramount. Without it, the Court is unable to proceed further and down tools. As held by Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, the Court must have jurisdiction to act:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending



other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. I have meticulously reviewed the Magistrate’s holding in the Lower Court in her Ruling dated 23rd July 2024 on the single issue of res judicata. She considered that Succession Cause No.182 of 2016 had been concluded. She reckoned that the Plaintiff in the primary suit would seek a declaration that he is entitled to half of the estate of land known as Kilifi/Roka/113 as an inheritance from his parents, from the Estate of Kabina Kai Mwachemba (Deceased), already distributed by Nyakundi J. in the said Succession Cause. She cited the decisions in Re Estate of Alice Mumbua (deceased) [2017] eKLR, where Musyoka J. held:

“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. 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. The interventions by that court are limited to what I have stated above.”

12. The Trial Magistrate also cited the decision in David Ngugi Kamau & 8 others v Waithira Mohoyo & 4 others [2021] eKLR on the doctrine of res judicata where Mutungi J. held:

“On examining the Succession Court’s ruling of 2nd September 2020, it is clear that the court was called upon to determine whether the Applicants had made out a case for revocation of grant, which it found in the negative. (See Paragraph 27). The court found that the issues raised were post-transmission and did not fall within the purview of the Succession Court. In my view, the dispute of ownership/distribution of the property between the plaintiffs and the defendants was unresolved. Differently put, the ownership dispute cannot be said to have been determined with finality in the succession cause. All the parties did in the succession cause was to agree that their mother, the 1st defendant be registered as the sole owner of the suit property. Was such registration to be as a trustee as alleged by the plaintiffs or as an absolute owner? Did the plaintiffs have any interest in the property transmitted to the 1st defendant and in case they did what was the nature of the interest? The succession court having concluded its brief of having the property transmitted as agreed by the parties in the succession Court did not have any further mandate to deal with post transmission disputes between the parties.”

13. Looking at how the Magistrate directed herself through judicial precedents and the law, the ELC or the Magistrates Court will resolve the issue of ownership post-succession in so far (for the latter) as long as it will not surpass the pecuniary jurisdiction as provided under Section 9(a) of the Magistrates Court Act 2015 as read with Section 26 of the ELC Act.
14. Consequently, the current appeal lacks merit and is hereby dismissed with costs



DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kinaro, for the Appellant

Mr. Angima, for the Respondents

Happy: Court Assistant

