



Kirera & another v Land Registrar, Meru Central & 2 others; Marangu & another (Interested Parties) (Petition E010 of 2023) [2024] KEHC 2143 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E010 OF 2023
EM MURIITHI, J
FEBRUARY 29, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
27, 40, 45, 47 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLE 10, 22, 23, 28, 45
AND 165 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT

AND

IN THE MATTER OF THE ESTATE OF M'KIRERA KIRERA (DECEASED)

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT

BETWEEN

SAMMY MUGAMBI KIRERA 1ST PETITIONER

MOSES NGERA M'KIRERA 2ND PETITIONER

AND

THE LAND REGISTRAR, MERU CENTRAL 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

JENIFFER NKATHA MARANGU INTERESTED PARTY



JUDGMENT

1. By a notice of motion under certificate of urgency dated 16/5/2023 pursuant to Rule 3 (1), 23 and 24 of the *Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*, Articles 22, 23 and 165 of the Constitution, Order 40 Rules 1, 2, 3 and Order 51 of the *Civil Procedure Rules*, the *Law of Succession Act*, the *Land Act* and all other enabling provisions of the law, the Petitioners seek that:
 1. Spent
 2. Spent
 3. This Honorable Court be pleased to issue temporary orders of injunction restraining the Respondents by themselves, their employees, agents, servants, representatives and/or anybody else whomsoever acting for and/or on their behalf from continuing with and/or carrying out any dealings on Land Parcel L.R No. Abothuguchi/katheri/2292 be it subdivision, charge, transfer or any other act of interference pending the hearing and determination of this petition.
 4. This Honorable Court be pleased to issue temporary orders of injunction restraining the Interested Parties by themselves, their agents, employees, relatives, representatives and/or anybody else whomsoever acting for and/or on their behalf from entering, selling, interfering or carrying out any acts of interference on Land Parcel L.R No. Abothuguchi/Katheri/2292 pending the hearing and determination of this application.
 5. This Honorable Court be pleased to issue temporary orders of injunction restraining the Interested Parties by themselves, their agents, employees, relatives, representatives and/or anybody else whomsoever acting for and/or on their behalf from entering, selling, interfering or carrying out any acts of interference on Land Parcel L.R No. Abothuguchi/katheri/2292 pending the hearing and determination of this petition.
 6. This Honorable Court be pleased to issue any conservatory and/or interim orders as may meet the ends of justice in this matter.
 7. Cost of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by an affidavit of 1st Petitioner sworn on even date. He avers that the deceased herein was his and the 1st Interested Party's father and the 2nd Interested Party's grand father. The deceased had three wives namely Zipporah Karimi (deceased), Evangeline Nthanga M'Kirera and Rael Gaiti M'Kirera. After the court noted that the petitioner Evangeline Nthanga was too old to comprehend the proceedings, it appointed him and Julius Mwititi Kirera as co-administrators of the deceased. The court distributed Abothuguchi/Katheri/2125 jointly to the Interested Parties and the 2nd wife Evangeline Nthanga to have a life interest thereon. The court gave the Petitioners L.R No. Abothuguchi/Katheri/2292 to share equally since they belonged to the 3rd house. On appeal by the Interested Parties, the court ruled that Evangeline Nthanga should get L.R No. Abothuguchi/Katheri/2125 in whole while L.R No. Abothuguchi/Katheri/2292 to be shared equally between the Interested Parties. Dissatisfied with that distribution, they filed a notice of appeal dated 26/5/2020 and applied for certified copies of the proceedings and the judgment for purposes of pursuing the appeal. The court belatedly supplied them with the



proceedings on 13/5/2021 and a certificate of delay which was ready for collection on 25/3/2022. They filed an application at the Court of Appeal at Nyeri on 22/9/2022 seeking leave to appeal out of time, which application was dismissed on 17/1/2023. They believe that they should not be punished as the delay was partly occasioned by the court and partly by their advocates. The Interested Parties, in conjunction with the Interested Parties went ahead to fraudulently transfer Abothuguchi/Katheri/2292, to themselves and were issued with a title deed on 27/4/2022. They wrote a letter notifying the 1st Respondent that as the joint administrators of the estate, they had not executed any transmission documents, which letter was ignored. The Interested Parties are now threatening to evict them from L.R No. Abothuguchi/Katheri/2292 which they have been using together with their deceased mother for a very long time now. They have been advised by their advocates that they have a recourse by filing this petition in light of Meru Constitutional Petition No. E017/2021 which declared Section 35 of the *Law of Succession Act*, unconstitutional. They stand to suffer irreparable loss which cannot be compensated by way of damages if the eviction threats by the Interested Parties are carried out, and it is in the interest of justice that the application is allowed.

3. The 1st Petitioner swore supplementary and further supporting affidavits on 11/8/2023 in support of the application.
4. The Interested Parties opposed the application vide a replying affidavit sworn by the 1st Interested Party on 19/6/2023. She avers that land parcel No. Abothuguchi/Katheri/2292 was granted to them by this court, and they are genuine registered proprietors thereof.

Preliminary Objection

5. The Interested Parties filed a notice of preliminary objection on 12/9/2023 on grounds that:

“The petition herein is res-judicata the judgment then H.C Civil Appeal No. 98 of 2019 which was between same parties involving the subject herein; Secondly, that this Honourable court is being asked in prayer (a) of the petition to declare that the decision of Hon. Lady Justice Anne Adwera Onginjo unconstitutional since it violated the doctrine of equality and freedom from discrimination as well as rights for parties is marriage, this Honourable court as constituted has no jurisdiction to declare judgment of a judge of concurrent jurisdiction unconstitutional.”

Submissions

6. The Petitioners urge that they have established a genuine and arguable case with a probability of success, and cite *Giella v Cassman Brown & Company Limited* (1973) EA 358 and *Mrao Ltd v First American Bank of Kenya and 2 others* (2003) KLR 125. They urge that if they are evicted from L.R No. Abothuguchi/Katheri/2292 which they have been utilizing, they will suffer irreparable loss which cannot be compensated by way of damages, and cite *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR. They submit that when a court has to delve into the issues in question in the petition, then it no longer qualifies as a preliminary objection, and cite *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2021) eKLR and *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* (2022) eKLR. They urge that it will be an injustice to strike out the petition on the basis of it being *res judicata* without hearing it on merit, and cite *Iron v Saskatchewan (Minister of the Environment & Public Safety)*, 1993 Can LII 6744 (SK CA) (1993) 6 WWR 1 (Sask CA). They urge that their case should be heard in the new dispensation of section 35(1)(b) of the *Law of Succession Act* being declared unconstitutional. They urge that the court has the requisite jurisdiction to grant the reliefs sought and to declare the judgment of a concurrent constitutional court unconstitutional.



7. The Respondents urge that this matter cannot be re-litigated in a court of concurrent jurisdiction having been previously dealt with by this court, and thus the same ought to be struck out. They urge that the matter is *res judicata* having been determined by a court of competent jurisdiction, and cite *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, *Civicon Limited v Kenya Revenue Authority & Another* (2014) eKLR, *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & 3 others* (2021) eKLR and *Moses Mbatia v Joseph Wamburu Kihara* (2021) eKLR.
8. The Interested Parties urge that the petition fails and under the perimeter of *res judicata*, the court should not entertain it. They urge that this court has no jurisdiction to declare a judgment of a judge of concurrent jurisdiction unconstitutional.

Analysis and Determination

9. Having considered the preliminary objection, the application, the responses thereto and the well elaborated written submissions together with the authorities cited therein, the issues for determination are whether preliminary objection was properly taken, and if not, what orders should issue.
10. What properly constitutes a preliminary objection has been defined times over including in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
11. This court in Meru Succession Cause No. 26/1988 *In the Matter of the Estate of Thomas Mbui Njenge Alias Thomas Nchenge (Deceased) David Mbuko T. Mbui v Susan Gacheri* Vol. 8 No. 62 held that:

“In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.”
12. The Respondents and the Interested Parties urge that the matter is *res judicata* having been dealt with by this court and it cannot be re-litigated again here. On their part, the Petitioners urge that the application and the petition ought to be heard on their merits.
13. The Section 7 of the *Civil Procedure Act* provides for *res judicata* 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.”



14. In order to gauge whether the matter is *res judicata* or not, this court has to briefly look at oscillated history of this matter.
15. The judgment of the trial court dated 17/7/2019, which appointed the 1st Petitioner and Julius Mwiti Kirera as co-administrators of the estate read in part that, “The dispute is therefore between beneficiaries of the 2nd and 3rd wife. The petitioner is currently in occupation of Abothuguchi/Katheri/2125. I find it fair that parcel of land Abothuguchi/Katheri/2125 be owned jointly by Jeniffer Marangu and Harriet Kendi and the petitioner Evangeline Nthanga to have a life interest over that parcel of land. I find that the deceased’s sons all got more than one acre of land from the deceased save for Sammy Mugambi and Moses Ngera who got 0.75 acres each. I find it fair for the two; Sammy Mugambi and Moses Ngera to share land Abothuguchi/Katheri/2292 equally.”
16. Dissatisfied with that decision, the Interested Parties and Evangeline Nthanga Kirera lodged an appeal in this court, where the court (Anne Adwera Onginjo J.) ruled that:

“I do note that the daughters of the deceased did not benefit *intervivos* during the lifetime of the deceased. the Petitioner/Appellant in her proposed mode of distribution did not give them any shares and the Respondent/Administrators in their affidavit of protest sworn on 11th January 2019 Sammy Mugambi Kirera had also proposed that parcel No. 2125 would be owned jointly between Evangeline Nthanga and Julius Mwiti whereas LR No. Abothuguchi/Katheri/2292 was to be shared equally between Moses Ngera and Sammy Mugambi to the exclusion of Jeniffer Marangu the daughter of the deceased and Harriet Kendi the granddaughter of the deceased. the sons of the deceased were granted a considerable share during his lifetime; Henry Murithi PW3 got 1.1 Acres and he did not have an interest in the estate as he was satisfied with what the deceased gave him. Jacob Kinoti (deceased) got 1 acre which went to his wife Elizabeth Karoki, Julius Mwiti got 1.10 Acres, Sammy Mugambi 0.75 acres and Moses Ngera 0.75 acres. This has therefore to be taken into account during the distribution of the estate so as to bring other beneficiaries as near as possible to those who benefitted during the lifetime of the deceased. The remainder of the estate that is liable for distribution measures 1.00 acres. The deceased herein was polygamous during his lifetime. The estate of the deceased ought to be distributed in line with Section 40 of the *Law of Succession Act*...I do therefore find that the trial magistrate erred in not only relying on the provisions of Section 40 of the *Law of Succession Act*. The immediate course would therefore require that the trial Court takes into account the net intestate estate and distribute it amongst the beneficiaries who were not provided for by the deceased during his lifetime. Abiding by the provisions of Section 40 of the *Law of Succession Act* the widow of the deceased ought to have been considered as a unit of the estate as opposed to granting her life interest in the estate....On the fifth ground, I have perused the record and there is nowhere the trial Magistrate has indicated that the daughters of the deceased did not claim any share to the estate. It is Protestor/Respondent(s) who in their submissions wanted the trial Magistrate to presume that the daughters of the deceased had denounced their rights of inheritance by executing consent to mode of distribution filed by the Petitioner/1st Appellant. That ground is therefore misleading and cannot be considered in finding whether the appeal should succeed or should fail. In consideration that the sons of the deceased were sufficiently provided for during his lifetime: a. Henry Muriithi – 1.10 acres b. Julius Mwiti – 1.10 acres c. Jacob Kinoti (deceased) – 1.00 acres d. Sammy Mugambi – 0.75 acres e. Moses Ngera – 0.75 acres. The remaining net intestate estate is only 1.0 acres, in consideration that the 1st Appellant is also to be considered as a unit on her own, this court finds that she should get LR No. Abothuguchi/Katheri/2125 measuring 0.50 acres



in whole and LR No. Abothuguchi/Katheri/2292 to be shared equally between Jeniffer Marangu and Harriet Kendi the daughter of Janet Keirea (deceased).”

17. In dismissing the 1st Appellant’s application for leave to appeal out of time, the Court of Appeal rendered thus, “In the present application, it was clear to this Court that the application is for dismissal. Although the Applicant satisfactorily explained the delay in failing to obtain typed copies of the proceedings in time, he failed to give a reasonable explanation why he failed to collect the proceedings when he was notified that the proceedings were ready for collection by the Court. The Applicant further failed to give a reasonable explanation for the delay in obtaining the Certificate of Delay from the Court. This was from 13th May, 2021 to 25th March, 2022. Furthermore, the Applicant did not give a satisfactory explanation why he did not file the present application until after the expiry of six months from the time he obtained the Certificate of Delay. The delays, considered cumulatively, is evidence of inexcusable indolence that the Court cannot countenance. It disentitles the Applicant to the exercise of discretion by this Court. It is not clear from the draft Memorandum of Appeal if the Applicant will have appeal that may succeed on merits. This Court formed the view that the Respondents will be unduly prejudiced taking into consideration the history of litigation between the Applicant and the Respondents. In the premises therefore, this application for extension of time to file appeal out of time is disallowed.”
18. This court finds that the matter is indeed *res judicata*, having been previously heard and determined by this court. This court is equally functus officio, having already made its decision in the Judgment which the Petitioner unsuccessfully sought to appeal to the Court of Appeal.
19. As urged by the Respondents and the Interested Parties, the Court respectfully also holds that it has no jurisdiction to find fault in and declare unconstitutional a judgment of a court of equal and concurrent jurisdiction.

Orders

20. Accordingly for the reasons set out above, this court finds merit in the Interested Parties’ Preliminary Objection herein.
21. This court lacks jurisdiction to go into the merits of the Petitioners’ application dated 16/5/2023, it shall consequently down its tools and application together with the Petition herein are struck off with costs to the respondents.
22. File closed.
23. Order accordingly.

DATED AND DELIVERED ON 29TH DAY OF FEBRUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Muriuki Ngera for Mr. Atheru for the Petitioner.

Mr. Mburugu for Interested Parties.

Mr. Wachira Nguyo for Respondents.

