



**In re Estate of Fredrick M’Ithinji alias M’Ithinji M’Mwamba (Deceased)
(Succession Cause 12 of 2019) [2024] KEHC 4083 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 12 OF 2019
EM MURIITHI, J
APRIL 25, 2024
IN THE MATTER OF THE ESTATE OF FREDRICK
M’ITHINJI ALIAS M’ITHINJI M’MWAMBA (DECEASED)**

BETWEEN

JULIUS KIAMBATI M’MBURA APPLICANT

AND

JOSEPH KITHINJI GITONGA 1ST RESPONDENT

ISABELLA NCERI KITHINJI 2ND RESPONDENT

JENNIFER NKIROTE M’ITHINJI 3RD RESPONDENT

ROSEMARY KARIMI MUTHAMIA 4TH RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 16/2/2024 brought under Articles 10 and 159 of the Constitution, section 47 of the Law of Succession Act, Order 1 Rule 3 & Order 42 Rule 6 of the Civil Procedure Rules, section 1a, 1b, 3 & 3A of the Civil Procedure Act, section 68 & 101 of the Land Registration Act and all other enabling provisions of the law, the Applicant seeks:
 1. Spent
 2. That the Honourable court be and is hereby pleased to enjoin and make the applicant Julius Kiambati M’Mbura interested party in this cause.
 3. That pending the hearing and determination of this application inter-partes the honourable Court be pleased to review its orders closing the hearing of the applications on 1st & 7th February 2024 and a ruling on the same would be delivered on the 14.03.2024.



4. That the honourable court be pleased to arrest its ruling in this matter slated for delivery on 14.03.2024 pending inter-partes hearing and determination of this application.
 5. That the honourable court be and is hereby pleased to issue a temporary order of injunction restraining the respondents, their relatives, their agents or anyone else authorized by them from trespassing into, interfering with, entering into, leasing out, selling, demand rent, or in any unlawful manner from interfering with the applicant's peaceful and quiet occupation, possession, user and developments on the land parcel Meru Municipality Block II/51 pending hearing and determination of this application and the applications pending ruling on 14.03.2024.
 6. That the Honourable court be pleased to issue an order of temporary stay of implementation of the certificate of confirmation of grant confirmed on 11.10.2022 and/or rectified/amended thereafter pending hearing and determination of this application and the applications pending ruling on 14.03.2024.
 7. That the honourable court be pleased to revoke/annul the grant of representation of the estate issued and confirmed on 11.10.2022 and/or rectified/amended thereafter.
 8. That costs of this application be provided for.
2. The application is supported by the grounds on the face of it and an affidavit sworn by the Applicant, on even date. He avers that after purchasing MERU MUNICIPALITY BLOCK II/51 (hereinafter called the suit land) from the proprietors in common, he obtained his certificate of lease thereof in 2016. The 3rd Respondent was one of the proprietors in common who sold her share to him, and he took actual occupation and possession of the land which he extensively developed with rental premises. All the Respondents and other family members have been fully aware of his purchase, occupation and development of the suit land. The Respondents concealed a material fact that the suit land wholly belongs to him which move was to unlawfully deprive him of his property. This cause has been conducted in secrecy and misrepresentation of facts because the Respondents and other beneficiaries are moving zealously to deprive him of his land. He is apprehensive that the parties in this matter could be colluding to defeat his claim as a bonafide purchaser and registered owner of the suit land. As a matter of fact, the Respondents have issued demand letters to his tenants to collect rent from his property, and as the owner of the suit land, he prays to be enjoined as an interested party so that he can ventilate his interest. The grant of the orders sought in the application will preserve the suit land pending determination of the issues herein. It is crystal clear that he has very serious interest in the suit land and he prays for the application to be allowed.
 3. The Applicant swore 2 supplementary affidavits on 26/2/2024 and 5/3/2024 in support of his application.
 4. The 1st Respondent swore a replying affidavit on 26/2/2024. He avers that the application is incompetent, an afterthought, an abuse of the court process and this court lacks jurisdiction to entertain it. The 2nd, 3rd and 4th Respondents are the ones in charge of the property now and lawfully so. The application the Applicant is seeking to arrest its ruling is dated 2/8/2023 between him and some tenants over a different property being MERU MUNICIPALITY II/42 which has nothing to do with the Applicant. The Applicant was well aware of the cause from its inception and he now applying so that he can go back and collect rent which is his sole purpose.
 5. The 4th Respondent swore a replying affidavit on 26/2/2024. She avers that the Applicant has concealed very serious material facts to this court and as such, he does not deserve to either be enjoined in this



cause or to be granted any orders whatsoever. Upon reverting L.R NO. MERU MUNICIPALITY BLOCK II/51 (50%) to the deceased's name, and in view of the fact that the said land was distributed to Isabella Ncheri Kithinji, Jennifer Nkirote Ithinji and her, they filed a consent in court on 1/2/2024 agreeing that all rent from this property should be paid to them and they have already opened an account with ABSA Ltd and the tenants have already started depositing rent therein. The Applicant is not a beneficiary of the deceased herein, he never purchased any land from the deceased and his presence in these proceedings is improper and against the Law of Succession. The Applicant has no interest to protect in these proceedings and the present application is a clever plan by him to stay the decree in Meru ELC 172/2016 through the back door.

6. The 1st and 2nd Respondents filed a Notice of Preliminary Objection on 26/2/2024 raising 2 grounds that:
 1. This application is *res-judicata* Meru ELC Suit No. 172 of 2016 Joseph Kithinji Gitonga vs Julius Kiambati M'Mbura & Jeniffer Nkirote M'Ithinji.
 2. The application is otherwise incompetent and an abuse of the court process.
7. The 1st and 2nd Respondents filed a list of authorities on 6/3/2024.
8. The application and the P.O were urged orally in court and a ruling reserved.

Analysis and Determination

9. The issue for determination is whether the preliminary objection has been properly raised.
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 are 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. 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.”

13. The import of this doctrine was espoused in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, where the Court of Appeal stated thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

14. Similarly in *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, the Court of Appeal stated that;

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

15. The registration of the Applicant as the sole proprietor of the suit land was challenged by the 1st Respondent in Meru Environment and Land Court Case No. 172 of 2016. In that case, the Applicant (sued as the 2nd defendant) claimed that the deceased herein bequeathed to the 3rd Respondent (sued as the 1st defendant) the suit land which she in turn sold to him. The 1st Respondent (the plaintiff in that case) maintained that the registration of the suit land in the Applicant’s name was fraudulent and illegal, and he sought cancellation thereof.

16. In its judgment dated 4/10/2023, the ELC court (C.K Nzili J.) held that:

“97. The duty was upon the 2nd defendant to ascertain the true ownership of the suit land before purchasing the half share. It is apparent from the disclaimer to the agreement that the 2nd defendant knew of and was privy to the simmering family dispute. There is no evidence that the 2nd defendant utilized the concept of buyer beware to verify how profound the family dispute over the land was and the likelihood of it fundamentally affecting the transaction, then and in the future. The 2nd defendant assumed the risk even when there were glaring red flags. There is no evidence that other than relying on DW1, the 2nd defendant went ahead to ascertain the nature and the magnitude of the rivalry between the 1st defendant and her siblings, including reaching out to the widow of the deceased. Given the disclaimer, it is pretty apparent that the 2nd defendant was aware that the registered owner of the half share was dead. Instead of insisting on being provided with a confirmed grant as proof of capacity to represent the estate of the deceased, the 2nd defendant opted to transact with the 1st defendant. To that extent, my view under the



circumstances is that the 2nd defendant cannot be described as an innocent purchaser for value without notice going by caselaw from the Supreme Court... In this suit, the court has found that the 1st defendant had no good title to pass to the 2nd defendant. The 2nd defendant was also aware of the family rivalry, and instead of awaiting its conclusion, he purported to overburden the 1st defendant, to guarantee him a clean title and/or indemnify him in clause number 2 of the sale agreement dated 22.8.2016. He thought that was enough regardless of the law. The 2nd defendant assumed the risk and went into a sale and transfer of a land belonging to a deceased person. He cannot, therefore, be heard to invoke the doctrines of equity, for he who comes to equity must come with clean hands and show equity...The upshot is that I declare that the transfer of the half share of LR Meru Municipality Block II/51 to the name of the 1st defendant and later to the name of the 2nd defendant as irregular, unlawful, null and void ab initio. The court, under Section 80 of the Land Registration Act, cancels any entries made after 14.7.2016, and the land registrar is directed to revert the title to its original state as of 14.7.2016 for the portion of half share belonging to the late M'Ithinji M'Mwamba to be dealt with under the Law of Succession Act. Cost to the plaintiff.”

17. This court concurs with the 1st and 2nd Respondents that the issues of ownership of the suit land were exhaustively dealt with by the Environment and Land Court, and they cannot possibly be re-litigated here by a court of concurrent jurisdiction.
18. This court finds that the issues raised in the application dated 16/2/2024 are re-judicata, having been fully heard and finally determined by the Environment and Land Court.
19. The Applicant is oscillating from one court to the other in search of a favorable outcome. That is abuse of the court process.

Orders

20. Accordingly, for the reasons set out above, this court finds merit in the Respondent's Preliminary Objection dated 26/2/2024.
21. This court lacks jurisdiction to go into the merits of the Applicant's application dated 16/2/2024, and it shall consequently down its tools and strike out the application.
22. There shall be no order as to costs.
Order accordingly. That

DATED AND DELIVERED THIS 25TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Thangacia for the Applicant

Mr. Muia Mwanzia for the 1st and 2nd Respondent

Ms. Kiome for the 3rd Respondent

Mr. Mwirigi Kaburu for the 4th Respondent

