



**Muchemi v Wambugu & 4 others (Family Appeal 7 of 2023)  
[2024] KEHC 6041 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6041 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
FAMILY APPEAL 7 OF 2023**

**MA ODERO, J**

**MAY 27, 2024**

**BETWEEN**

**BONIFACE BUNDI MUCHEMI ..... APPELLANT**

**AND**

**MARY WATURI WAMBUGU ..... 1<sup>ST</sup> RESPONDENT**

**PHILIP WANJOHI WAMBUGU ..... 2<sup>ND</sup> RESPONDENT**

**PRISCILLA MUTHONI WAMBUGU (SUED AS THE ADMINISTRATORS OF  
THE ESTATE OF HARUN WAMBUGU – DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

**LYDIAH WANGECHI WAMBUGU ..... 4<sup>TH</sup> RESPONDENT**

**EMMAH WAMBUI WAMBUGU ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Preliminary Objection dated 13<sup>th</sup> July, 2023 filed by the Respondents.

**Background**

2. *Vide* a Ruling delivered on 17<sup>th</sup> May, 2023 Hon. M. M. Gituma Senior Resident Magistrate, dismissed the Applicant's Summons for revocation of Grant in Nyeri Succession Number 96 of 1974 on grounds that the original parcel of land did not exist.
3. The Appellant Boniface Bundy Muchemi being aggrieved by said Ruling filed a Memorandum of Appeal dated 24<sup>th</sup> May, 2023.



4. The Appellant herein Boniface Bundi Muchemi also filed in court a Notice of Motion dated 8<sup>th</sup> June, 2023 seeking the following orders;-

- “(a) Spent.
- (b) Spent.
- (c) That there be a stay of the order and Ruling of the Senior Resident Magistrate, Honourable M. M. Gituma dated 17<sup>th</sup> May, 2023 Succession Cause No. 96 of 1974 pending the hearing and determination of the instant Application and Appeal.
- (d) That a temporary injunction to issue restraining the respondents, their assigns and agents from disposing, transferring or interfering in any way with land Parcels Tetu Kiriti/937 And Tetu Kiriti/938
- (e) That the court adds Lydiah Wangechi Wambugu and Emma Wambugu the daughters of the deceased and current holders of Tetu Kiriti/937 And Tetu Kiriti/938 respectively as interested parties.
- (f) That costs of this Application be in the appeal.”

5. The Appellant deponed that he had been born on the property known as Tetu/kiriti/135 which property was originally registered in the name of his Grandfather one Maingi Ndiangui. That the said Plot 135 was later fraudulently transferred to Harun Wambugu Muchemi as the sole proprietor.

6. That Harun Wambugu Muchemi thereafter subdivided the land into two parcels being Tetu Kiriti/1937 and Tetu Kiriti/938, which two parcels were gifted to the daughters of Harun Muchemi Wambugu namely Lydiah Wangechi Wambugu and Emma Wambui Wambugu (the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein).

7. The Appellant stated that pursuant to the court ruling he was apprehensive that he may be evicted from the suit land which would render his appeal nugatory. He averred that in order to meet the ends of justice the 4<sup>th</sup> and 5<sup>th</sup> Respondents ought to be added as interested parties to the suit. Finally the Appellant argued that he stood to suffer substantial loss if the orders of stay were not granted.

8. On 4<sup>th</sup> July, 2023 Hon. Lady Justice F. Muchemi granted a stay of the Ruling of 17<sup>th</sup> May, 2023 and also granted a temporary injunction restraining the Respondents, their assigns and agents from disposing of or interfering with LR Tetu Kiriti 1937 and Tetu Kiriti/938 (hereinafter ‘the suit properties’). The above Interim Orders were to remain in force pending hearing and determination of the Application dated 8<sup>th</sup> June, 2023.

9. The Respondents then filed a Notice of Motion dated 13<sup>th</sup> July, 2023 seeking the following orders;-

- “(a) Spent
- (b) Pending the interpartes hearing of the Application there be a temporary stay of *ex-parte* Orders granted on 4<sup>th</sup> July, 2023.
- (c) That the court be pleased to grant early interpartes hearing of the application.
- (d) That the *ex-parte* orders given on 4<sup>th</sup> July, 2023 by the court be set aside and or vacated on the ground that the said *ex-parte* orders were obtained through



concealment and non-disclosure of material facts and misleading of the court, that the order was obtained through falsehood and misdirection.

(e) That the court lacks jurisdiction.”

10. On 25<sup>th</sup> July, 2023 the Hon. Lady Justice Muchemi lifted the interim Injunctive Orders which had been granted preventing any dealings with Plots 937 and 938 and directed the Respondents to file a reply to the application dated 13<sup>th</sup> July, 2023.
11. The Respondents then filed a Notice of Preliminary Objection against the application dated 13<sup>th</sup> July, 2023 which Preliminary Objection was premised upon the following grounds;-
  - “(a) The application is frivolous and vexatious and bad in law with no order capable of being stayed.
  - (b) That the applicant seeks to enjoin parties who were not in the chief magistrate’s court.
  - (c) That the threshold for injunction orders have not been met.
  - (d) Stay orders cannot issue against parties who were not before the honourable court.
  - (e) That the appeal is bad in law and ought to be struck out *in limine*”
12. On 16<sup>th</sup> November, 2023 this court directed that the Preliminary Objection would be heard first and would be canvassed by way of written submissions. The Appellant filed the written submissions dated 20<sup>th</sup>, February, 2024, whilst the Respondent, relied upon their written submissions dated 28<sup>th</sup> March, 2024.

### **Analysis And Determination**

13. I have carefully considered the Preliminary Objection filed by the Objectors as well as the written submissions filed by both parties.
14. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] E. A in which the court stated as follows;

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued as a Preliminary point may dispose the suit. Examples are an objection of the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A Preliminary Objection is in the nature of what is used to be a demurrer.

It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”



15. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated that

“ a Preliminary Objection may only be raised on a “pure question of law”

16. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record”

17. Therefore in order for a Preliminary Objection to succeed, the following tests must be satisfied;-

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary objection ought if successful dispose of the entire suit.

18. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

19. The Respondents submit that in view of the Ruling delivered by Hon Justice Muchelule (as he then was) on 8<sup>th</sup> April, 2020, the Notice of Motion filed by the Respondents dated 12<sup>th</sup> April, 2023 is *Res Judicata* and is therefore for striking out.

20. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue is 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”

Black’s law Dictionary 10<sup>th</sup> Edition defines “*res judicata*” as “An issue that has been definitely settled by judicial decision.... The three essentials are (1) an earlier decision on the issue, (2) a final judgment on them merits and (3) the involvement of same parties, or parties in privity with the original parties.....”

21. I have considered the grounds upon which the Notice of Preliminary Objection is based. By no stretch of imagination can these be said to be ‘Pure points of law.’ The Respondents claim that the Intended Interested parties were not parties to the suit in the Magistrates Court. This is a matter which can only be determined upon examining the record of the lower court.

22. The question of joinder raised in the Preliminary Objection is also not a pure point of law. It will require arguments from both parties to determine.

23. The prayer to have the appeal struck out *in limine* is also one which will require substantive arguments to determine. In my view this prayer is in any event premature

24. On the whole I find that the purported Notice of Preliminary Objection does not fit the requirements as set out in the Mukhisa Biscuit Case and has no merit. The same is therefore for dismissal.



25. Finally the application of 13<sup>th</sup> July, 2023 sought to stay the *Ex parte* orders made by the court on 4<sup>th</sup> July, 2023 on grounds that said orders were obtained through concealment and non-disclosure of material facts.
26. A close perusal of the record in this matter reveals that on 25<sup>th</sup> July, 2023 Hon. Justice Muchemi did lift (i.e set aside) the interim orders which had been granted on 4<sup>th</sup> July, 2023. This means therefore that prayer (d) of the application dated 13<sup>th</sup> July, 2023 has already been granted.
27. The Respondents can thus reconsider whether they still want to prosecute this particular application.
28. Finally I find no merit in the Notice of Preliminary Objection dated 13<sup>th</sup> July, 2023. The same is hereby dismissed in its entirety. Costs will be borne by the Respondent.

**DATED IN NYERI THIS 27<sup>TH</sup> DAY OF MAY, 2024.**

**MAUREEN A. ODERO**

**JUDGE**

