



**Kariuki & 3 others (Suing as Chairman, Vice Chairlady, Secretary and Treasurer of members on their behalf and of Lake Naivasha Riparian Association) v National Land Commission & 8 others; Ethics & Anti-Corruption Commission & another (Interested Parties) (Environment & Land Petition E009 of 2022) [2023] KEELC 19987 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19987 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND PETITION E009 OF 2022**

**LA OMOLLO, J**

**SEPTEMBER 21, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10,  
20 (2), 21, 22 (1), 23 (3), 27 (1), (2), (5), 40 (6), 47, 50 (1), 60 (1), 62  
(1) (L, N), 67, 69,70, 162 (2) AND 258 OF THE CONSTITUTION OF  
KENYA 2010**

**BETWEEN**

**MARK KARIUKI ..... 1<sup>ST</sup> PETITIONER  
ALEXANDRA BELL ..... 2<sup>ND</sup> PETITIONER  
MAIRO RETIEF ..... 3<sup>RD</sup> PETITIONER  
GARY HOPCRAFT ..... 4<sup>TH</sup> PETITIONER  
SUING AS CHAIRMAN, VICE CHAIRLADY, SECRETARY AND TREASURER  
OF MEMBERS ON THEIR BEHALF AND OF LAKE NAIVASHA RIPARIAN  
ASSOCIATION**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
DIRECTOR OF SURVEYS ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
DUNCAN WACHIRA KABITHE ..... 5<sup>TH</sup> RESPONDENT  
GEOFFREY MUHORO ..... 6<sup>TH</sup> RESPONDENT**



LAWRENCE TONY KURIA ..... 7<sup>TH</sup> RESPONDENT  
MARGARET W. KAGWE ..... 8<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF NAKURU ..... 9<sup>TH</sup> RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY  
WATER RESOURCES AUTHORITY ..... INTERESTED PARTY

## RULING

### Introduction.

1. This ruling is in respect of the 6<sup>th</sup> Respondents Notice of Preliminary objection filed in Court on 9<sup>th</sup> February, 2023.
2. The objection is on the following ground:

That the Petitioners Application and the Petition dated 20<sup>th</sup> December, 2022, be struck out with costs to be paid forthwith to the 6<sup>th</sup> Respondent on the basis that the suit property LR 22957/74 has been a subject matter in Civil Suit Number 97 of 2009, Geoffrey Muhoro v Lake Flowers Limited [2011] Eklr, Nakuru ELC Case No 244A of 2018; Republic v National Land Commission & Others exparte Duncan Kabethi Wachira, Nakuru ELC Case No 244 B of 2018; Republic v National Land Commission; Lake Naivasha Riparian Association (Interested party) Ex parte Geoffrey Muhoro [2020] eKLR between the parties and is therefore res judicata.

### Factual Background.

3. This suit was commenced by way of a Petition dated 20<sup>th</sup> December, 2022. The Petitioners seek the following orders;
  - a. A declaration be and is hereby issued that the alienation, demarcation and allocation of all that land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha comprised in or referred as L.R No 22597/1, LR No. 22597/2, LR No 22597/3 and LR No 22597/4 allocated to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto is illegal, unlawful, unprocedural, irregularly, contrary to *the Constitution* of Kenya, 2010 hence null and void ab initio.
  - b. An order of judicial review by way of certiorari do issue to call, remove, deliver up to this Honourable Court and quash the decision of by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents particularly the decision by the 1<sup>st</sup> Respondent and or its predecessor to demarcate, alienate and allocate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6, 210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as L.R No. 22597/1, LR No 22597/2, LR No 22597/3 and LR No 22597/4



allocated to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents respectively by way of a Certificate of Lease, Deed Plans and any other document of title thereto.

- c. An order be and is hereby issued directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to revoke and/or cancel all the entries of the Certificate of Lease, Certificate of titles, Deed Plans and any other document of title over all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as L.R No 22597/1, L.R No 22597/2, LR No 22597/3 and LR No 22597/4 illegally, fraudulently and unprocedurally allocated to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents whether in 1997 or at a later stage.
- d. A mandatory injunctive order of eviction, be and is hereby issued compelling the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents, their servants, agents, employees or anyone claiming to be on possession to vacate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as L.R No 22597/1, LR No 22597/2. LR No 22597/3 and LR No 22597/4 with immediate effect.
- e. An order of permanent injunction do issue restraining the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup>, Respondents and herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, alienating, allocating, selling, leasing, transferring to anyone, trespassing, remaining on, wasting away, damaging, removing, cutting trees or any vegetation thereon, draining the water thereon, charging, encumbering and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or as L.R No 22597/1, LR No 22597/2, LR No 22597/3 and LR No 22597/4 allocated to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto or otherwise.
- f. An Order of permanent injunction do issue to restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, demarcating, alienating, allocating, transferring to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents or any other private person and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or as L.R No 22597/1, LR No 22597/2, LR No 22597/3 and LR No 22597/4 allocated the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto or otherwise in contravention of [National Land Commission Act](#), 2012 and [the Constitution](#) of Kenya, 2010.
- g. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to publish and/or issue a gazette notice declaring that all the portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or



as L.R No 22597/1, LR No 22597/2, LR No 22597/3 and LR No 22597/4 falls within Lake Naivasha Riparian reserve forms part of Lake Naivasha Riparian Land and is a public land.

- h. A restoration order be and is hereby issued directing the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents to restore the land, including the replacement of soil, replanting of trees and other flora and fauna comprised in or as LR.No 22597/1, LR No 22597/2, LR No 22597/3 and LR No 22597/4 into its initial state it was prior to ploughing, harvesting of trees and/or undertaking any prohibited activities on the riparian land.
  - i. Any other relief that the Court may deem fit to grant in the circumstances of the Petition, and
  - j. Costs of the Petition be provided for.
4. On 30<sup>th</sup> January, 2023 when the matter came up in court for directions in respect of the Petitioner's application. Counsel for the 6<sup>th</sup> Respondent sought more time to file his response and also stated his intention to raise a preliminary objection.
  5. The 6<sup>th</sup> Respondent filed a Notice of Preliminary Objection which was received by the Court on 9<sup>th</sup>, February, 2023 and a Replying Affidavit dated 10<sup>th</sup> February, 2023 in response to the Petitioners Notice of Motion Application dated 20<sup>th</sup> December, 2022.
  6. Directions were issued that the preliminary objection would be canvassed by way of written submissions. The 6<sup>th</sup> Respondent filed his submissions on 9<sup>th</sup> February, 2023 while the Petitioner filed written submissions dated 10<sup>th</sup> March, 2023 whereas
  7. Counsels for the 9<sup>th</sup> Respondent and the 2<sup>nd</sup> Interested party intimated to Court that they were not opposed to the preliminary objection.

#### **6<sup>th</sup> Respondent's Submissions.**

8. The 6<sup>th</sup> Respondent submits that its preliminary objection dated 6<sup>th</sup> February, 2023 is on a point of law and is anchored on the facts that suit property LR 22957/4 registered in the 6<sup>th</sup> Respondent's name has been a subject matter in Civil Suit Number 97 of 2009, Geoffrey Muhoro vs Lake Flowers Limited [2011] Eklr, Nakuru ELC Case No 244A of 2018; Republic Vs National Land Commission & Others exparte Duncan Kabethi Wachira, Nakuru ELC Case No 244 B of 2018; Republic Vs National Land Commission; Lake Naivasha Riparian Association( Interested party) Ex parte Geoffrey Muhoro [2020] eKLR between the parties and is therefore res judicata.
9. Counsel for the 6<sup>th</sup> Respondent submits that the suit property, LR 22957/94 has been at the centre of several suit that have taken different forms and all involving the 6<sup>th</sup> Respondent and Lake Naivasha Riparian Association, the petitioners. He states that the Petitioners have appeared in all the suits.
10. It is his submission that in the case of, Geoffrey Muhoro Vs Lake Flowers Limited [2011] Eklr which the civil case number 97 of 2009, the judge went into the merit of how the suit property evolved to the 6<sup>th</sup> Respondent.
11. It is also his submission that the Petitioners featured prominently where the court said; "The Defendant called one John Richard Githere Mbugua, who was one of the applicants in the Nbi. H.C. Misc. Civil Application No. 1238 of 1998. He confirmed that his farm neighbours that of the Defendant and therefore, like the Defendant, he enjoys riparian rights of Lake Naivasha and is also a member of Lake Naivasha Riparian Association".



12. He further submits that Justice Ouko (as he then was) after thoroughly analyzing both oral, evidence and submissions made the following findings about the title that was given to the 6<sup>th</sup> Respondent after following all the procedures; “In terms of section 23 (1) of the Registration of Titles Act, the certificate of title issued to the Plaintiff is conclusive evidence that he is the absolute and indefeasible owner of the property subject only to encumbrances, easements, restrictions and conditions contained in the title. The title of the proprietor cannot be challenged except on the ground of fraud or misrepresentations to which he is proved to be a party. The Plaintiff’s title has not been challenged on any of the above grounds as the Defendant has not made any counterclaim.”
13. It is his submission that in the case of National Land Commission & Others *ex parte* Duncan Kabethi Wachira, Nakuru ELC Case No 244B of 2018; Republic Vs National Land Commission; Lake Naivasha Riparian Association (Interested party) *Ex parte* Geoffrey Muhoro [2020] Eklr, the 1<sup>st</sup> Respondent tried to revoke the title to the suit property and Justice Ohungo quashed the decision of the cancellation. He states that the Petitioners were an interested party in the suits and they did not lodge an appeal.
14. The 6<sup>th</sup> Respondent submits that the above historical background set at by him gives rise to only one issue for determination which is; whether the matter before the court is *res judicata*.
15. The 6<sup>th</sup> Respondent relies on the case of C.K Bett Traders Limited & 2 others Vs Kennedy Mwangi & another [2021] Eklr which quotes Section 7 of the [Civil Procedure Act](#) on the issue of *res judicata*.
16. The 6<sup>th</sup> Respondent submits that the issues raised in this matter have been heard and finally decided by a court of competent jurisdiction and that the court should rely on this dictum and find that there should be an end to litigation. He submits that the doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given, future and further proceedings are estopped.
17. The 6<sup>th</sup> Respondent further submits that the rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
18. He submits that it is clear from the history of the cases on the suit property that since 1998 the Petitioners want the 6<sup>th</sup> Respondent to spend most of his time in litigation.
19. It is his submission that *Res judicata* is normally pleaded as a defence to a suit or cause of action where the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. He further relies on the decision in *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others*, [2017] Eklr.
20. He further submits that the Petitioners have been mutating from interested parties, to petitioners to defendants and at some other times when cases are heard, they appear as witnesses.
21. The 6<sup>th</sup> Respondent submits that although the Petitioners argue that the court did not consider the validity of the title deed in *Republic Vs National Land Commission*;

Lake Naivasha Riparian Association (Interested party) *Ex parte* Geoffrey Muhoro [2020] Eklr, they are trying to restore the decision that was quashed by Justice Ohungo on the 3<sup>rd</sup> of July, 2020. The 6<sup>th</sup> Respondent submits that at paragraph 15 of the affidavit in support of the Petition it is deponed that the court, in the suit where they were an interested party; “should have directed the 1<sup>st</sup> Respondent in this petition to cancel the titles.”



22. He further submits that the law has evolved that interested parties are allowed to appeal where substantive party loses interest in an appeal. He states that the Petitioner in that matter was allowed and had the capacity to appeal but has decided to convert this court into an Appellate court. He further submits that by converting an appeal into a fresh Petition where the interested party now becomes the substantive party amounts to an abuse of court processes and the court has power to guard itself from such abuse.
23. The 6<sup>th</sup> Respondent submits that the suit property validity of the title deed has been decided by the Court and a matter where decision to cancel the title deed has now been sneaked into the same court as a petition and that nothing can be more absurd.
24. He concludes his submission by stating that the 6<sup>th</sup> Respondent has become a punching bag with suits one after the other and the intention is to tire him. He submits that this particular suit should be struck out with cost as it is couched as a public interest matter but if the veil were to be lifted, it is a personal matter and vexatious suit against the 6<sup>th</sup> Respondent.

#### **Petitioners Submissions.**

25. The Petitioners on the other hand submit that the issue in dispute is not ownership of the suit properties, but it is whether or not the suit properties, being LR Nos 22597 1/1, 22597/2, 22597/3 and 22597/4 allegedly owned by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents respectively, falls within Lake Naivasha Riparian land.
26. The Petitioners submit that The Lake Naivasha Catchment Area Protection Order, 2012 (Legal Notice No 8 of 2002) defines Lake Naivasha riparian land to include all that land and water enclosed within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres or 6,210 feet above sea level contour.
27. It is the Petitioners submission that the issue that was in dispute in Nakuru Civil Suit No 97 of 2009 between the 6<sup>th</sup> Respondent and Lake Flowers Limited, was the ownership of property known as LR No 22597/4. It is their submission that it was not whether or not the said parcel fell within Lake Naivasha riparian land. It is also their submission that the Lake Naivasha Riparian Association was not a party to the suit in court.
28. It is also the Petitioners submission that with respect to Nakuru ELC JR No 244A/2018 and ELC JR No 244B/2018 filed by the 5<sup>th</sup> and 6<sup>th</sup> Respondents against the NLC, the learned judge was categorical in paragraphs 27 and 25 that the decision did not consider the validity of the suit properties in question since the main focus was the decision-making process by the 1<sup>st</sup> Respondent herein, as is contained in the letter dated 22<sup>nd</sup> August, 2016.
29. The Petitioners further submit that the issue in dispute in the judicial review cases was the revocation of titles by the 1<sup>st</sup> Respondent vide its decision dated 22<sup>nd</sup> August, 2016 which was the issue of ownership and not whether or not the said parcel fell within Lake Naivasha riparian land as pleaded in the present petition.
30. The Petitioners submit that it is clear that the issues in dispute in the present case, that is whether or not the properties in question falls within Lake Naivasha riparian land, were never determined in Nakuru Civil Suit No 97 of 2009, Nakuru ELC JR No 244A and Nakuru ELC JR No 244B and are therefore open for determination by this Honourable Court.
31. On whether the 6<sup>th</sup> Respondent's Notice of Preliminary Objection is based on pure points of law, the Petitioners rely on the cases of Mukhisa Biscuit Manufacturing Co Ltd Vs West End Distributors



Limited [1969] EA 696 as cited by Lady Justice Kasango in Civil Suit No 88 of 2016; Kenya Breweries Limited & another Vs Keroche Breweries Limited [2020] Eklr and the case of Ruth Njeri Zeyhle V Eberhard Zeyhle & Another [2010] Eklr to illustrate that for a preliminary objection to be merited; it must be based on pure points of law, facts are undisputed, no evidence is required to establish the same and it will dispose the proceedings entirely.

32. The Petitioners submit that contrary to the foregoing, the 6<sup>th</sup> Respondent's only ground of objection is that the Petition and the application are res-judicata, which is not a matter of pure points of law but an issue of fact. It is the Petitioners submission that to establish this ground, the court must examine the evidence and pleadings in the court file.
33. The Petitioners also submit that it is a well-established principle of litigation that the issues of res judicata, duplicity of suits and suit having been spent require probing of evidence, and as such, the same are incapable of being raised through preliminary objections.
34. The Petitioners submits that when a party raises a preliminary objection on ground of res-judicata, the following decisions have to be taken into account by the 6<sup>th</sup> Respondent; the case of Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd & Another (2014) EKLR cited in the Margaret Njeri Gitau Vs Julius Mburu Gitau & 2 others [2022] Eklr; the case of George Kamau Kimani & 4 others Vs County Government of Trans Nzoia & Another (2014), Eklr and Josephat Njuguna Karugu Vs Margaret Nduta Ngugi & 2 others [2021] Eklr
35. The Petitioners submit that in the present case, for the court to establish whether the issues in the present petition fits into the four-cornerstones of res-judicata under section 7 of the [Civil Procedure Act](#), the Court must examine and probe the petition, the affidavit evidences as well as the annexures.
36. The Petitioners also submit that all the facts have been disputed by various parties including the 6<sup>th</sup> Respondent who filed a voluminous Replying Affidavit sworn on the 16<sup>th</sup> February, 2023. It is their submission that the court must also look at the 2<sup>nd</sup> Interested Party's Replying Affidavit dated 13<sup>th</sup> February, 2023 adding that the same cannot be summarily dismissed at preliminary stage through a preliminary objection.
37. On whether the present application and petition are res-judicata, the Petitioners state that the Petition and Application dated 20<sup>th</sup> December, 2022 are not res-judicata. The Petitioners rely on Section 7 of the [Civil Procedure Act](#), the case of Moses Mbatia Vs Joseph Wamburu Kihara [2021] Eklr, the case of The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, [2017] Eklr.
38. The Petitioners submit that the defence of res judicata will successfully be raised if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
39. The Petitioners urged the court to consider the following questions on res judicata. First, whether the issues in dispute in the present petition and application directly and substantially the same as in the former suits cited by the 6<sup>th</sup> Respondent. The Petitioners submit that the issue in dispute in the present petition is not ownership of the suit properties but whether the suit properties being LR Nos 22597 1/1, 22597/2, 22597/3 and LR No 22597/4 allegedly owned by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents respectively falls within Lake Naivasha Riparian land as defined in Nakuru ELC Petition No 17 of 2021: Mark Kariuki & 3 others Vs Nixon Kariuki Thuo & Others (2023) unreported.
40. The Petitioners also submit that the issue which was in dispute in Nakuru Civil Suit No 97 of 2009 between the 6<sup>th</sup> Respondent and Lake Flowers Limited was ownership of property known as LR No



- 22597/4 and it was not whether the said parcel fell within Lake Naivasha riparian land. It was also the Petitioners submission that the Lake Naivasha Riparian Association was not a party to the matter in court.
41. The Petitioners further submit that with respect to Nakuru ELC JR No 244A/2018 and Nakuru ELC JR No 244B/2018, the Learned Judge was categorical in paragraphs 25 and 27 that the decision did not consider the validity of the suit properties in question since the main focus was the decision-making process by the National Land Commission as contained in its decision dated 22<sup>nd</sup> August, 2016.
  42. It is the petitioner's submission that in delivering the rulings, the Judge expressly stated that he did not consider the legality of the titles in question and only looked at the process at which National Land Commission arrived at its decision dated 22<sup>nd</sup> August, 2016. The Petitioners submit that the judge ruled that National Land Commission overstepped their mandate by revoking the titles. It is also the Petitioners submission that the judge ruled that the powers to revoke titles were vested in the Registrar of lands and that National Land Commission would have directed the registrar to revoke them.
  43. The Petitioners also submit that the issue in dispute in the judicial review cases was the revocation of titles by the 1<sup>st</sup> Respondent herein on 22<sup>nd</sup> August, 2016 which was the issue of ownership and not whether the said parcel fell within Lake Naivasha riparian land as pleaded in the present petition.
  44. The Petitioners further submit that in the above cases, the 5<sup>th</sup> and 6<sup>th</sup> Respondents herein had pleaded with the judge to restrain the Respondents from revisiting the issue of validity of title through prohibitory injunction however the court declined to issue prohibitory order and ruled that the issue of validity of titles could be revisited any time.
  45. The Petitioners submit that the issues in dispute in the present case, that is whether the properties in question fall within Lake Naivasha riparian land, were never determined in Nakuru Civil Suit No 97 of 2009, Nakuru ELC JR No 244A and Nakuru ELC JR No 244B and are therefore open for deliberation by this Honourable Court.
  46. The Petitioners also submit that the former suits must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title and that the 6<sup>th</sup> Respondent's argument has not fulfilled this condition.
  47. The Petitioners submit that in Nakuru Civil Suit No 97 of 2009, the parties herein were Geoffrey Muhoro and Lake Flowers Limited. It was also the Petitioners submission that none of the members of the Association which was founded in 1929 was a party to it and that only former member of the Association, John Richard Githere (deceased) was called as a witness.
  48. The Petitioners also submit that in Nakuru ELC JR No 244A and Nakuru ELC JR No 244B, none of the members of the association was a party. It is their submission that the Association was only named as an interested party whereas in the present case, the association's members are the petitioners.
  49. The Petitioners rely on the paragraph 25 of the decision in *Sophy Njiri Vs National Bank of Kenya Limited & another; James Mwangi Njiri (Interested Party) [2020] Eklr* to illustrate that a party who is joined in a suit as an interested party cannot seek substantive orders as though it was a principal participant.
  50. The Petitioners submit that having been sued as an interested party, the members of the association could not have asked for any substantive orders including determination that the suit properties fall within Lake Naivasha riparian lands and further that the issue in dispute was the decision making process by National Land Commission.



51. The Petitioners submit that the 6<sup>th</sup> Respondent's contention that the Petitioner's Application and Petition dated 20<sup>th</sup> December, 2022 are res-judicata have not met the criteria set out in section 7 of the Civil Procedure Act and urge the court to find as such.
52. The Petitioners urge the Court to find and hold that the 6<sup>th</sup> Respondent's Notice of Preliminary Objection dated 6<sup>th</sup> February, 2023 is not properly raised, unmerited and that it should be dismissed with costs to the petitioners.

### **Analysis And Determination.**

53. I have taken into consideration the rival submissions filed by the petitioners and 6<sup>th</sup> Respondent and the several judicial decisions cited therein.
54. The only issue that arises for determination is whether the preliminary objection filed in court on 9<sup>th</sup> February, 2023 has merit.
55. A preliminary objection is defined in the case of Mukhisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited, 91969 EA 696 as follows;

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

56. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained.
57. The 6<sup>th</sup> respondent contend that the Petitioners Application and Petition dated 20<sup>th</sup> December, 2022 is res judicata as the suit property LR 22957/4 has been a subject matter in Civil Suit Number 97 of 2009, Geoffrey Muhoro Vs Lake Flowers Limited [2011] EKLR, Nakuru ELC Case No 244A of 2018; Republic Vs National Land Commission & Others exparte Duncan Kabethi Wachira, Nakuru ELC Case No 244 B of 2018; Republic Vs National Land Commission; Lake Naivasha Riparian Association( Interested party) Ex parte Geoffrey Muhoro [2020] EKLR between the parties.
58. These pleadings and decisions have not been made available to the court for interrogation. In Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd & Another (2014) EKLR cited in the Margaret Njeri Gitau v Julius Mburu Gitau & 2 others [2022] EKLR it was held as follows;

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always



had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

59. In *George Kamau Kimani & 4 others Vs County Government of Trans Nzoia & Another* (2014), EKLRL the Learned Judge held as follows;

“I have considered the points raised by the first Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. (Emphasis mine) Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence.”

60. In the case of *Josephat Njuguna Karugu vs Margaret Nduta Ngugi & 2others* [2021] Eklr, the court held,

“It is not in doubt that for the Court to ascertain whether the instant suit is Res Judicata, unprocedural or bad in law and an abuse of the Court process, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues. Therefore, the Court finds and holds that grounds No.1,3,4 and 5 are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing it and the Court ascertaining facts from elsewhere and therefore the same are not properly raised Preliminary Objection.”

61. These decisions are on all fours with the issues raised herein. Several suits and determinations have been mentioned by the 6<sup>th</sup> Respondent but these have not been made available to the court.
62. The Petitioners, on the other hand, have countered the assertions made by the 6<sup>th</sup> Respondents but they too have failed to avail any pleadings, ruling and/or judgments for interrogation by this court.
63. In order for this court to determine whether this suit is res judicata, it would have to peruse the pleadings in the various suits referred to by the 6<sup>th</sup> Respondent.

#### **Disposition.**

64. The question of res judicata cannot and should not be raised by way of a preliminary objection as it requires, at the very minimum, a scrutiny of pleadings in the alleged former suit or suits.
65. In the result, I find that the 6<sup>th</sup> Respondents Preliminary Objection filed in court on 9<sup>th</sup> February, 2023 lacks merit and is hereby dismissed with costs.
66. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of:



Mr. Rotich for the Petitioners

Miss. Sigei for Makori for 2nd interested party

MR. Rotich Gilbert for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent

No appearance for 5<sup>th</sup> respondent

Miss. Jaoko for 6<sup>th</sup> & 7<sup>th</sup> Respondents

No appearance for 8<sup>th</sup> Respondent

Miss. Litunda for 9<sup>th</sup> Respondent

1s interested party (Absent)

Court Assistant: Ms. Monica Wanjohi.

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