



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**E.L.C. PET 3 OF 2014**  
**FORMERLY KERUGOYA E.L.C.A NO. 1 OF 2013**

**JOHN NJUE NYAGA..... PETITIONER**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL..... 1<sup>st</sup> RESPONDENT**  
**NICHOLAS NJIRU NYAGA..... 2<sup>nd</sup> RESPONDENT**  
**HARRISON IRERI NYAGA .....3<sup>rd</sup> RESPONDENT**  
**NANCY WANJIRU MUTHEE.....4<sup>th</sup> RESPONDENT**  
**ANNE NJURA NYAGA..... 5<sup>th</sup> RESPONDENT**  
**JOYCE NJOKI NYAGA.....6<sup>th</sup> RESPONDENT**  
**SUSAN IGANDU NYAGA..... 7<sup>th</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. Mr. John Njue Nyaga has according to his petition petitioned:

*“5) This court be pleased to cancel and quash the tribunal award in Embu Provincial Appeals Committee being appeal case no. 30/05 which upheld the award of the Embu District Land Disputes Tribunal award case no. 35/04 that was adopted in L.D.T case no. 34 and the High Court order in Embu High Court Civil Appeal number 30 of 2006 as per the holding of the Court of Appeal in Nyeri Civil Appeal no. 175/10 that both tribunals and High Court had no jurisdiction. 6) The honourable court be pleased to order reinstatement of the registrar reflecting he(sic) petitioner as the registered proprietor of land parcel nos. Kagaari/Kigaa/1621 and Kagari/Weru/2103 as was the position before the unconstitutional acts were done. 7) Any other relief this court may deem fit to grant”.*

2. During the pendency of this petition, counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents raised a preliminary objection to the fact that the petition is *res-judicata*. According to them, the matter was finally dealt with by courts of competent jurisdiction namely, the Provincial Appeals Committee, the

High Court and the Court of Appeal. All these courts found against the petitioner.

3. Furthermore, counsel for the 1<sup>st</sup> respondent (the Hon. the Attorney General) also filed a notice of preliminary objection stating that the petition offends the mandatory provisions of Section 13 and 13A of the Government Proceedings Act Cap 40 Laws of Kenya. He has also stated that the petition is an abuse of the court process.

4. Finally, the Honourable the Attorney General says that the 1<sup>st</sup> respondent will highly be prejudiced if the suit is heard and determined as filed.

5. I have considered the rivals submissions of both counsel, their authorities and the following court judgements:

1. The verdict of the Land District Disputes Tribunal case no. 35/04 as adopted by the Magisterial subordinate court.

2. The Civil Appeal Judgement in Embu High Court Civil Appeal no. 30/06.

3. The Court of Appeal Civil Appeal judgment in Civil Appeal no. 175/10.

6. Having done so, I find that the issues raised by the petitioner were fully canvassed in the superior courts (High Court and Court of Appeal) and also in the Provincial Appeals Committee. The Attorney General (the 1<sup>st</sup> respondent) , Nancy Wanjiru Muthee, Ann Njura Nyaga, Joyce Njoki Nyaga and Susan Igandu were not parties in the proceedings in the Provincial Appeals Committee and in the two superior courts. The subject matter in the Provincial Appeals Tribunal, the High Court and the Court of Appeal was the same. The inclusion of Attorney General as 1<sup>st</sup> Respondent is irrelevant as the government is not claiming any share in the suit parcels of land. Furthermore, the co-respondents namely Nancy Wanjiru Muthee, Ann Njura Nyaga, Joyce Njoki Nyaga and Susan Igandu are covered by *res-judicata* as set out in section 7 Civil Procedure Act. The petitioner should have joined them as parties if he thought that there were necessary parties to his case in the superior courts and in the land tribunals, which made the award that is now complained of *Res judicata* applies to subsequent proceedings and matters which could and should have been raised in the earlier proceedings. This matter was ably stated in the English case of ***Greenhalg v Mallard (1947) 2 All ER 255, 257*** in the following terms:

***“.....res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but...it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.”***

7. The fact that the petitioner has now revived this matter by invoking the provisions of the constitution does not affect the validity of the judgements of the two superior courts and the magisterial judgement which adopted the award of the Land District Disputes Tribunal, as its judgement. This court has the status of the High Court and therefore cannot sit in judgement over the judgement of the High Court.

8. The upshot of all these is that the preliminary objection of both counsel for the respondents and that of the Hon. Attorney General are hereby upheld.

9. As a result, the preliminary objection is successful and the petition is dismissed with costs to the respondents.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this 21st day of April, 2015

In the presence of Ms. Muriuki holding brief for Mr Ithiga for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and in the presence of 6<sup>th</sup> and 7<sup>th</sup> respondents and in the absence of 1<sup>st</sup> respondent.

Court clerk Mr Muriithi.

**J.M. BWONWONGA**

**JUDGE**