



**Mugo and 76 others v Gekara Group Ranch through Hebert Nthiri and 343 others
(Petition 7 of 2018) [2022] KEELC 14589 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14589 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
PETITION 7 OF 2018
A KANIARU, J
OCTOBER 11, 2022

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,22(1),
(2), (4),23,24,28,29(C),40,43(B) AND 63 OF THE CONSTITUTION**

AND

IN THE MATTER OF ARTICLES 2(5), (6) OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 1, 8(2), (B), 9, 10, 18, 26, 28, 33,
37, 42, 43 AND 46 OF THE UNITED NATIONS DECLARATIONS
ON THE RIGHTS OF INDEGENOUS PEOPLE (UNDRIP)**

AND

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF THE
CULTURAL AND ECONOMIC RIGHTS OF THE GAKERA CLAN MEMBERS AS
INDEGENEOUS PEOPLE WITHIN THE MEANING OF THE UNITED NATIONS
DECLARATION ON THE RIGHTS OF INDEGINEOUS PEOPLE (UNDRIP)**

AND

IN THE MATTER OF THE COMMUNITY LAND ACT NO. 27 OF 2016

AND

**IN THE MATTER OF LAND (GROUP REPRESENTATIVE), ACT, 1968
AND CIVIL PROCEDURE**

IN THE MATTER OF LAND ADJUDICATION ACT

**AND IN THE MATTER OF PROTECTION FROM DEPRIVATION
OF PROPERTY AND THEIR ANCESTRAL LAND**



BETWEEN

BETWEEN

BEDAN MUNYI, JOSHUA NJERU MUGO AND 76 OTHERS PETITIONER

AND

**GEKARA GROUP RANCH THROUGH HEBERT NTHIRI AND 343
OTHERS RESPONDENT**

RULING

1. What is for determination before the court are two preliminary objections dated October 14, 2020 and 21.02.2021 respectively. The first was filed by the 262nd, 241st, 109th, 107th, 108th, 92nd, 83rd, 71st, 84th, 76th, 146th, 136th, 66th, 110th and 78th respondents. The objection is premised on four grounds, which are;
 - i. This petition is res judicata.
 - ii. The petition is filed contrary to Section 7 of the *Civil Procedure Act*, 2010 and therefore the Honourable court lacks jurisdiction to grant the orders prayed for.
 - iii. The petition is filed contrary to section 7 and 8 of the limitations of actions act.
 - iv. In any case, the petition is bad in law, vexatious and an abuse of the court process.
2. The second one was filed by the 30th, 34th, 300th, 301st, 302nd, 303rd and 334th respondents. The grounds in the second are similar to the grounds in the first save for a few issues. Nonetheless I will state the grounds in the objection which are that;
 - i. The amended petition is res judicata
 - ii. The amended petition is filed contrary to Section 7 of the *Civil Procedure Act*, 2020 and therefore the Honorable Court lacks jurisdiction to grant the orders prayed for.
 - iii. The amended petition lacks any legal basis, is unmerited and is filed contrary to the provisions of Sections 7 and 8 of the *Limitation of Actions Act*.
 - iv. The amended petition is filed contrary to the provisions of Article 40 of the *Constitution* of Kenya 2010 that protects the respondent's right to property.
 - v. Land parcel No Mbeti/Gachuriri/449 has never been registered as community land provided by Article 63(2) of the *Constitution* of Kenya.
 - vi. The amended petition is scandalous, frivolous or vexatious, bad in law is otherwise an abuse of the process of the court.
3. In a suit instituted by way of petition which was later amended on June 11, 2020, the petitioners stated to be members of the Gekara clan, which comprises of 400 families, said to be in occupation of land parcel Mbeti/Gachuriri/172 measuring 3000 acres. The land is currently said to be subdivided into Mbeti/Gachuriri/426 to 4490. It was their case that they have been residing, cultivating and carrying on activities on the land. They protested that the 1st respondent was appointed as chairperson of the



clan by the elders to spearhead the demarcation and fixing of boundaries for adjudication purposes and to eventually subdivide the land amongst the members who were in occupation.

4. However, he is said to have selected his closest allies, herein being the second to sixth respondents and two to three other persons who are now deceased, and they formed a group known as Trustees of Gekara Group Ranch allegedly for purposes of benefiting the clan, something the petitioners are arguing was a subterfuge. It is said that the said group registered the suit land in their names, subdivided it, and finally sold it to third parties who were not members of the clan. Further accusations were made that they gave huge chunks of land to their relatives to the detriment of the members of the clan who were already in occupation.
5. They aver to have made several complaints to the National Government seeking intervention and protection from harassment and from alienation and deprivation of their land by the respondents who were said to have embarked on massive looting and waste of the land. The petitioners maintained that their ancestors had resided on the land and on their part, they had permanent homes and were cultivating it. Simply put, they said the land was their own and they had nowhere else to call home. They expressed their frustration in their efforts to obtain titles to the land, which process they said had taken over 50 years and that it was expensive, tasking, long, and arduous, with the respondents' actions worsening the situation. In the petition, they listed the members of the clan, the respective parcels belonging to the members, and finally the current registered owners of those parcels of land all of whom are the respondents herein.
6. In the amended petition, they sought for a declaration that the original parcel of land Mbeti/Gachuriri/172 was clan land and was held in trust for the Gekera clan, that the adjudication process and subdivision of land parcel Mbeti/Gachuriri/172 to the new numbers Mbeti/Gachuriri 426 - 4490 was fraudulent, illegal and null; cancellation of the resultant subdivision of land parcel Mbeti/Gachuriri 426 - 4490 and a fresh subdivision to the legitimate members of the Gakera clan; permanent injunction to restrain the respondents from interfering with their peaceful enjoyment of the land; and costs of the petition.
7. The suit was responded to by the respective respondents. As the respondents are very many, I will not embark on scrutinizing each of the respondent's response but I will give a general summary and a snapshot of the responses. In a nutshell, there are two set of respondents. The first are the purchasers of the respective parcels. These ones basically denied the existence of the Gakera clan and also denied that the suit parcel of land was community land. They argued that they had purchased the land from the legitimate owners of the land for valuable consideration after conducting due diligence and ascertaining that the land was registered in the names of the vendors in their individual capacity and that they were not holding the land as trustees. It was said that the land did not have any encumbrances as no caution or restriction had been registered against it. Further also that the land control board had allowed subdivision of the land and issued the parties with the respective consents for transfer to them.
8. Regarding the land being community land, it was argued that no evidence had been produced to prove that the land was community land and neither was there proof of existence of the Gekera clan. It was also said that no prove had been attached to show that the said 1st respondent had been elected as a leader of the alleged clan. Most respondents stated that they were in occupation of the land for a long period and had enjoyed quiet, uninterrupted and peaceful occupation with some arguing that they have been in occupation for a period in excess of 31 years and had developed their respective land respective parcels. They demonstrated this by attaching photos to prove such development. They protested that the respondents had taken unusually long to assert their alleged rights on the land or to bring a claim. According to them, the suit was therefore time barred by virtue of Section 7 of the [Limitation of Actions Act](#). The suit was also said to be res judicata to Nthumbi Muchungu & Others v



Herbert Nthiri & Others ELC 224 of 2015 which was said to have been similar to this one. Ultimately, the court was urged to dismiss the amended petition with costs.

9. There is then the 2nd, 3rd, 4th, 5th, 8th, 9th and 20th respondents who are among the members alleged to be of Gekara Ranch Group. They filed a response sworn by the 3rd respondent on behalf of the others. His response was that Gekara clan was subdivided into 8 households, which had their respective parcels of land. He deposed that the suit parcel belonged to the Gamote household which owned 2,500 acres and he attached a search copy as prove of this. He said that the land had been leased to a cooperative society. But they later reclaimed their land and registered Gekara Group ranch which belonged to the Gamote household. It's leaders were the trustees of the Group ranch. The suit herein was said to be res judicata as according to him, the suit land was subject of litigation and that there was determination by the minister in Appeal No 70 of 1976 which was said to be the prevailing determination, as an appeal that had been filed against that decision had been dismissed. The petitioners were said to be having their own lands elsewhere based on their respective households.
10. The preliminary objection was canvassed by way of written submissions. I will start with the respondents' submissions. They submitted that the petition was res judicata to ELC No 224 of 2015. It was said that the petitioners were litigating over the same subject matter but had merely added more parties to the petition. It was argued that the petitioners had an obligation to bring forward the entire case and sue all the parties. They could not re-open the case to cover for their negligence, inadvertence and failure to include all the parties that ought to have been included. The respondents were also of the view that the judgment delivered by the court in ELC No 224 of 2015 was not binding on them as they were not parties to the suit in view of the doctrine of natural justice that demands that no party shall be condemned unheard.
11. On the issue of whether the suit was in contravention of Section 7 of the Limitations of Actions Act, it was said that the respondents, or most of them, had been registered on the land as owners more than 12 years ago. The land was said to have been subdivided in the year 1989 and that the claim by the petitioners was time barred since no action for recovery of land could be sustained after 12 years.
12. On whether the petition was contrary to the provisions of Article 40 of the *Constitution*. It was said that the respondents were legally and lawfully registered as the respective owners of the suit lands, which registration was said not to have been done fraudulently and further that they have been in occupation of the land. The *Constitution* was said to protect their interest as no claim of fraud had been levelled against them.
13. The other issue was whether the claim offended the provisions of Article 63(2) of the *Constitution*. The respondents submitted that the suit land was never registered as community land as provided under Article 63(2) of the *Constitution*.
14. The last issue was whether the petition was scandalous, frivolous, vexatious, bad in law and otherwise an abuse of the court process. It was said that indeed it was as it did not raise triable issues against the respondents. It was also ill-conceived, an afterthought, and misadvised.
15. The petitioners also filed their submissions. On the issue of res judicata, they submitted that the present petition was not similar to ELC Case No 224 of 2015. They stated the elements to be satisfied for a matter to be said to be res judicata as set out in the case of *Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others [2017] eKLR*. It was submitted that the two suits were not similar as the ELC No 224 of 2015 was with regard to 13 parcels of land apportioned from Mbeti/Gachuriri/172, while the petition is with regard to 4,065 parcels of land derived from clan land registered as Mbeti/Gachuriri/172 which portions were Mbeti/Gachuriri/426 to 4490. The parties in ELC No 224 of 2015 were said to be Nthumbi Muchungu and 12 others v Herbert Nthiri & 16



Others. The plaintiffs in the suit were said to be suing in their own capacity and for their own interests. The parties in the petition now before court are Joshua Njeru Mugo & 76 others v Herbert Nthiri & 342 Others and it was argued that the petitioners are suing in their legal capacity both as officials of the Gekara clan and as members of the same clan and have brought the petition in their own interests, the interests of all the clan members, and residents of Ngaru land.

16. They submitted that *res judicata* was a point of fact which could not be raised in a preliminary objection. They relied on the cases of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR* and the case of *George Kamau Kimani & 4 Others v County Government of Transzoia & Another (2014) eKLR*.
17. On the second issue, which is whether the suit is time barred, the petitioners were of the view that the suit had been filed in time and was not time barred. It was said that the cause of action was premised on violation of constitutional rights and contravention of constitutional rights by the respondents. According to them, such matters are not time barred as they involve enforcement of constitutional rights. They said that what is violated is the petitioners constitutional right to land which could not be limited by statute. It was similarly argued that the Limitations of Actions Act could not supersede the provisions of the *Constitution* and that the respondents ought not to use it to contravene the provisions of the *Constitution*.
18. More specifically, it was said that the 52nd respondent who had averred that the suit was time barred had failed to specify when time started running as stipulated under Section 26 (a & b) of the *Limitations of Actions Act*. According to the petitioners, time started running when fraud or mistake on the respondents' part was discovered by them. The fraud was said to have been discovered by the petitioners in the year 2018 when they were litigating in ELC No 224 of 2015 when it was brought to their attention that the respondents had transferred the land to third parties. To buttress this issue, they relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another (2019) eKLR*.
19. On whether the suit land violates the provisions of Article 40 of the *Constitution*, the petitioners submitted that they too had rights under Article 63 of the *Constitution*, which rights were equally violated by the respondents. It was said that the clan members were entitled to the suit parcel of land in accordance with the judgment by Justice Y.M. Angima in ELC Case No 224 of 2015. The respondents were said to be in disobedience of the court orders by their continued interference with the suit parcels of land.
20. The last issue they sought to submit on was whether land parcel Mbeti/Gachuriri/449 was registered as community land as envisaged under Article 63(2) of the *Constitution*. This specific land is owned by the 52nd respondent who has raised the preliminary objection. They argued that from the history of the land, the specific parcel had been hived off from land parcel Mbeti/Gachuriri/172 which, according to the petitioners, was clan land. It was said that the clan land having been registered as community land, then it rendered that apportionment as clan land as well.
21. In conclusion the preliminary objection was said to be blurred with factual details which negate their validity as objections. The court was urged to sustain the suit rather than dismiss it. To drive this point home, the petitioners relied on the case of *DT Dobie & Co (Kenya) Ltd v Joseph Mbaria Muchina & Another (1980) eKLR*, and Article 159 (2) of the *Constitution*. The court was finally urged to dismiss the petition with costs to the respondents.



Analysis and Determination

22. I have considered the two preliminary objections filed, the respective submissions by the parties, and the court record in general. What constitutes a Preliminary Objection was set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*, where it was held that:
- “a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” It was also stated 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
23. A preliminary objection is therefore one that raises a pure point of law based on the assumption that the facts pleaded are correct. One can not raise a preliminary objection if facts have to be ascertained. Further, if argued, it is one that has the capability of disposing of a suit preliminarily.
24. The nature of a preliminary objection was also espoused in the case of *Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No22 of 1999*, where the Court stated thus: “When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”
25. As stated earlier in the ruling, there are two preliminary objections before me, which raise almost similar grounds of objection. It is plain to me that the first preliminary objection is a subset of the second. This means that a determination of the second preliminary objection is also a determination of the first one as well. The second preliminary objection has six points or grounds as follows:
- i) The amended petition is res judicata
 - ii) The amended petition is filed contrary to Section 7 of the [Civil Procedure Act](#), 2020 and therefore the Honorable Court lacks jurisdiction to grant the orders prayed for.
 - iii) The amended petition lacks any legal basis, is unmerited and is filed contrary to the provisions of Sections 7 and 8 of the [Limitation of Actions Act](#).
 - iv) The amended petition is filed contrary to the provisions of Article 40 of the [Constitution](#) of Kenya 2010 that protects the respondent’s right to property.
 - v) Land parcel No Mbeti/Gachuriri/449 has never been registered as community land provided by Article 63(2) of the [Constitution](#) of Kenya.
 - vi) The amended petition is scandalous, frivolous or vexatious, bad in law is otherwise an abuse of the process of the court.
26. I have looked at the points of objection and I am of the view that points 1,2, 3, 4 are 5 are merited as points of law. Point 6 in my view would require the court to call evidence to ascertain the facts raised. The issue as to whether the amended petition is scandalous, frivolous, vexatious, bad in law, or an abuse of the court process is one that can only be determined during trial by calling evidence to ascertain its veracity.



27. I however also note that the petitioners are of the view that an objection that a suit is res judicata can not be raised in a preliminary objection. They have relied on the cases of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR* and *George Kamau Kimani & 4 Others v County Government of Transzoia & Another (2014) eKLR*. I have looked at the cases. Unfortunately, I hold a contrary view regarding the issue of res judicata as addressed in the two cases. A point raised that a matter is res judicata to another is a point of law capable of disposing of the suit if established well. It is raised on the assumption that all facts pleaded are correct. Further, section 7 of *Civil Procedure Act*, which covers res judicata, is a provision of law. How can one call it a fact?
28. With regard to the issue of res judicata raised as a preliminary objection, the court in the case of *Super Drill International Limited v Sidian Bank Limited [2021] eKLR*, stated thus
- “In the present case, the PO is premised on the main ground that the instant suit is res judicata. Regard is had to Section 7 of the *Civil Procedure Act* that sets out the threshold for holding that a suit is res judicata. This argument no doubt is a point of law and is advanced on the assumption that facts as pleaded by the Plaintiff are correct. Issues that touch on law need not be ascertained by evidence as the law speaks for itself. That applies to this case, more so on the ground that should the court find for the Defendant, the decision has the effect of entirely disposing of the suit. In the foregoing, I find and hold that the PO is valid and properly before the court”.
29. There are therefore five grounds for determination, the first is on the amended petition being res judicata. The respondents are of the view that this suit is similar to ELC 224 of 2015. The determination of this issue will shed light on whether there is need to proceed and determine the rest of the grounds raised. If this amended petition is indeed res judicata to the suit stated earlier, then the court will be stripped of jurisdiction. It cannot proceed to make a determination on a matter that has been determined with finality by a court of competent jurisdiction. Before I delve into the issue any further, let me first discuss the doctrine of res judicata. The legal provision for this doctrine is found under Section 7 of the *Civil Procedure Act*. It states:- “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.”
30. The doctrine of Res Judicata seeks to oust the jurisdiction of the court from trying any suit or issue which has been determined by a court of competent jurisdiction with finality in a former suit, involving the same parties or parties litigating under the same title. As correctly pointed out by the petitioners, the elements to be satisfied in a case of res judicata were set out in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR)*, where the Court of Appeal held: “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.



- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
31. At this juncture I will seek to establish whether the following elements have been met. The first is whether the suit or issue was directly and substantially in issue in the former suit. The respondents have argued that the petitioners were litigating over the same subject matter but had merely added more parties to the petition. The issues in the petition were said to be directly in issue in the former suit.
32. The suit referred to is Embu ELC 224 of 2015 which was a consolidation of several other suits. That suit was instituted by members of the Gekara clan against the alleged trustees of the Gekara clan and persons said to be purchasers of the land. The contention in that suit was an alleged fraudulent appropriation of Gekara Clan land Title No Mbeti / Gachuriri / 172 by the alleged trustees of the clan who were said to have held the land in trust for the clan but instead caused it to be registered in their names and later disposed of it to third parties. The Defendants had denied being representatives of Gekara clan and argued that the land was owned by Gekara Group Ranch (hereinafter known as “Gekara Group”) which they said to be a body registered under the Land (Group Representatives) Act 1968.
33. Among the orders sought by the plaintiffs was that the 10 trustees of the group Ranch were trustees of Gekara clan and not Gekara Group Ranch over Mbeti/Gachuriri/172 and an order of the rectification of the register thereof, a declaration that the Plaintiffs were entitled to the parcels they each occupy and further that each defendant do transfer the titles registered in their respective names to the Plaintiffs occupying the respective parcels of the land. The court in its determination made a finding that the suit property, Mbeti/Gachuriri/172, rightfully belonged to Gekara clan and not Gekara Group Ranch and subsequently ordered that the registration of Gekara Group Ranch as proprietor of Title No Mbeti/Gachuriri/172 was fraudulent and all sub-divisions and transfers of the suit property to the Defendants was null and void.
34. The amended petition herein was instituted by members of the Gekara clan. It was instituted against the respondents, some of whom were said to be trustees of the clan while others were purchasers. The clan was said to comprise of 400 families who were alleged to be in occupation of land parcel Mbeti/Gachuriri/172 measuring 3000 acres. Their claim was that the land had been vested in the Gekara clan trustees for purposes of holding it in trust for the clan and eventually subdividing it and allocating it to the members. They were instead accused of forming a group known as Trustees of Gekara Group Ranch under which it is said that they registered the land under their names and later subdivided it into Mbeti/Gachuriri/426 to 4490 and sold it to third parties who were not members of the clan. The clan members are alleged to be residing and carrying on activities on the land.
35. They have in sought orders in the petition for a declaration that the original parcel of land Mbeti/Gachuriri/172 was clan land and was held in trust for the Gekara clan, that the adjudication process and subdivision of land parcel Mbeti/Gachuriri/172 to the new numbers Mbeti/Gachuriri 426 - 4490 was fraudulent, illegal and null, cancellation of the resultant subdivision of land parcel Mbeti/Gachuriri 426 - 4490 and a fresh subdivision to the legitimate members of the Gakera clan, permanent injunction to restrain the respondents from interfering with their peaceful enjoyment of the land and costs of the petition.
36. From the pleadings by the parties, are the issues raised in the petition similar to the ones in ELC 224 of 2015? The contention in both suits is suit parcel of land Mbeti/Gachuriri/172 which in both cases is said to have belonged to Gekara clan but vested in the trustees of the clan. The trustees have been sued in both cases. In both suits, the parties are protesting the subdivisions of the land. In the former suit they had sought rectification of the register while in the latter they had sought cancellation of titles



to parcels Mbeti/Gachuriri 426-4490. The alleged manner of transfer of title was similar in both suits. It was the trustees who had initiated the transfer of the respective parcel to the third parties. I note however that the parties in the two suits are not the same. In the first suit (ELC 224 OF 2015) It had been filed by members of the Gekara clan against trustees of the clan and some purchasers of the land. The petition herein has been filed by members of the Gekara clan who are more than in the former suit and it is against the trustees and quite a number of purchasers of the suit land. Buy I find that despite some differences in the parties, both suits are essentially instituted by members of the Gekara clan against the trustees of the clan and the purchasers who bought land from them.

37. It has been argued by the respondents that the suit is the same as the earlier one and the petitioners have only added more parties. I agree with the respondents on this. The suit is similar and the petitioners herein are merely more members of the clan than in the earlier suit. They have also added more purchasers as respondents. But the action of adding more parties in a suit where they are litigating on the same issues does not render the suit different. Courts cannot allow parties to litigate over the same issues litigated before a different court by merely adding parties and filing it in court and styling it as a constitutional petition. The change of genre of the case from an ordinary suit to a constitutional petition does not matter. The two suits are broadly similar.

38. In this regard, the court in the case of *Attorney General & another ET (2012) eKLR*, sated as thus;

“The Courts must always be vigilant to guard litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of *Omondi & National Bank of Kenya & others (2001) E.A 177*, the Court held that “parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the Court quoted Kuloba J. (as he then was) in the case of *Njauju v Wambugu & another HCCC No 234 of 1991 (Nairobi)* (unreported) where he stated: ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of doctrine of res-judicata’.

39. Similarly in the former suit the parties sought for rectification of the title while in this suit they have been specific in their prayers where they have sought for cancellation of titles. They have listed the registered owners of those titles and the persons that ought to be the rightful owners. But the prayers seek to achieve the same purpose. I find that the two suits to be similar despite the addition of parties and the tweaking of prayers. The court in ELC 224 of 2015 in it’s determination proceeded to make the following orders “A declaration is hereby issued that the registration of Gekara Group Ranch as proprietor of Title No Mbeti/Gichuriri/172 was fraudulent and that all sub-divisions and transfers of the suit property to the Defendants was null and void”. In it’s findings it had stated that the suit property, Mbeti/Gachuriri/172, rightfully belonged to Gekara clan and not Gekara Group Ranch.

40. I find this petition to be res judicata to ELC 224 of 2015. The orders sought in the amended petition were granted by the court in the suit. What is left for the parties in my view is to proceed and execute those orders. It is superfluous to file the present petition. It is trite law that litigation must come to an end and the doctrine of res judicata serves to bring such finality to determination of issues. In the



case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR)*, the Court explained the role of the doctrine of res judicata 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 commonsensical 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

41. I reiterate that the issues in the amended petition were determined with finality in the earlier suit. The court is being invited to determine yet again what it determined in the earlier suit. This is untenable. It is unfortunate that the parties in the petition were not involved in the former suit but the court expressed itself with finality with regard to the suit parcel of land Mbeti/Gachuriri/172 and the subdivisions thereof.
42. Having made a determination as above, I need not proceed to determine the rest of the grounds raised in the preliminary objections. As it stands the issue of res judicata has been determined in the affirmative. The court therefore lacks jurisdiction to determine the suit and it hereby downs its tools. Jurisdiction is what gives the court the ability to move further and without it, there is no power to make one more step. See the Court of Appeal case in *The Owners of Motor vessel "Lilian S" v Caltex Oil Kenya Ltd (1989) 1 KLR 1*.
43. The upshot of the foregoing is that the preliminary objections have merit in terms of ground 1 in both objections and the amended petition herein is dismissed with no orders as to costs. I have decided not to explore the other grounds or points of objection because the issue of res Judicata alone has been found sufficient to dispose of the entire suit. If I had found res-judicata not demonstrated, I would have proceeded to make findings on the other points or grounds.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF OCTOBER, 2022.

In the presence of M/s Mwinja also for M/s Fatuma Wanjiku for 30th, 300th, 301st, 302nd, 303rd, and 334th respondents

Court Assistant: Leadys

A K KANIARU

JUDGE

