



REPUBLIC OF KENYA



KENYA LAW
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**Kabiri v Githinji & another (Environmental and Land Originating Summons
E004 of 2021) [2025] KEELC 2988 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 2988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2021**

MN GICHERU, J

APRIL 1, 2025

THE MATTER OF LIMITATION OF ACTION OF ACTIONS ACT CAP 22 LAWS

AND

**IN THE MATTER OF LAND PARCEL NO: MARAGWA/RIDGE/18 CURRENTLY
SUB-DIVIDED TO MARAGWA/RIDGE/559 AND MARAGWA/RIDGE/560**

BETWEEN

PETER NGUGI KABIRI APPLICANT

AND

ESTHER WANGARI GITHINJI 1ST RESPONDENT

FLORA WANJIKU GITHINJI 2ND RESPONDENT

RULING

1. This ruling is on the notice of motion dated 12-11-2024. The motion which is by the Respondents is brought under Sections 1, 1A, 3, 3A and 7 of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules 2010, Article 159 (2) (b) of the *Constitution* of Kenya and all other enabling provisions of the Law.
2. The motion seeks two orders as follows.
 2. Dismissal of this suit for offending the doctrine of res judicata.
 3. That the costs of this application be provided for.

The motion is based on four (4) grounds and is supported by an affidavit sworn by the first Respondent, Esther Wangari Githinji, dated 12th November 2024. The gist of the grounds and the deposition in the supporting affidavit is as follows. Firstly, the parties in this case are the same parties in Kigumo ELC 20 of 2018, Murang'a ELC case No. E009/2021 and Nyeri Court of Appeal case No.



E057 of 2024. Secondly, the suit land is the same being L.R.No. Maragwa/Ridge/18 now subdivided into Maragua/Ridge/559 and 560. Thirdly, judgment has already been rendered in Kigumo ELC case No.20 of 2018 and the land awarded to the Respondents. The Applicant in this case lost an appeal at Murang'a ELC case No. E009/2021 and has filed a second appeal in the Court of Appeal in Nyeri being Appeal Case No. E057 of 2024. Finally, the suits having been handled by Courts of competent jurisdiction, the same parties cannot now litigate over the same land. The suit is res judicata.

3. The motion, is opposed by the Respondent who has filed a replying affidavit dated 10-12-2024 in which he replies as follows. Firstly, ELC Appeal No. 9 of 2021 dealt with a single issue of trust and that is the same issue in Nyeri Court of Appeal case No. E057 of 2024. Secondly, the current suit is based on adverse possession which is a distinct and separate cause of action. Finally, there has never been a decision by any Court on the issue of adverse possession. For the above and other reasons, the motion dated 12-11-2024 should be dismissed.
4. I have carefully considered the motion dated 12-11-2024 in its entirety including the grounds, the affidavits and the entire record which contains the two judgments at Kigumo (ELC 20 of 2018) and ELC Murang'a (ELC Appeal No. E009 of 2021). I find that there is only one issue for determination namely;
 1. Is this suit res judicata in view of the judgments in Kigumo ELC 20 of 2018 and ELC Murang'a Appeal No. E009 of 2021?

I find that this suit is not res judicata for the following reasons.

5. For a suit to be res judicata under Section 7 of the *Civil Procedure Act*, the following five(5) conditions must be fulfilled.
 - i. The issue in dispute in the current suit must have been in issue in the former suit.
 - ii. The parties in the current suit must be same parties in the former suit, or must be parties under whom they or any of them claim.
 - iii. The parties in the current suit must be litigating under the same title as in the former suit.
 - iv. The litigation must have been before a Court of competent jurisdiction.
 - v. The suit must have been heard on merit and determined.
6. Comparing this suit and Kigumo ELC 20 of 2018, we find that the crux of the matter in the Kigumo case was whether the Respondents' husband held a portion of the suit land in trust for the Applicant. In this case, the issue is whether the Applicant is entitled to a portion of the suit land through the doctrine of adverse possession. The condition in (i) above has not been met.
7. Although the conditions in (ii), (iii), (iv) and (v) have been met, this is not sufficient to make a finding that this suit is res judicata because all the five conditions must exist together. In other words the five (5) conditions are conjunctive and not disjunctive. The absence of any condition means that the threshold of res judicata is not attained.

For the above stated reasons, I dismiss the motion dated 12-11-2024.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 1ST DAY OF APRIL, 2025.

M.N. GICHERU



JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Applicant’s Counsel – Miss Nyariki

Respondents’ Counsel – Mr. Wachira

