



REPUBLIC OF KENYA



**Muriuki & 6 others v Njagi (Constitutional Petition
E002 of 2024) [2025] KEELC 3615 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
CONSTITUTIONAL PETITION E002 OF 2024**

JM MUTUNGI, J

MAY 8, 2025

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF
CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES (1)(2), 2(1), 3(1),
10, 22(2)(A), 23, 25, 27, 40, 47(2)(3), 50(1), 64, 159(2)(D), 162(2)(D), AND 258(2)(A)**

AND

**IN THE MATTER OF ARTICLE 40(1) OF THE CONSTITUTION OF KENYA 2010 AND
IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 SEE SECTION 28(B)**

AND

IN THE MATTER OF LAND PARCEL NO. NGARIAMA/RUNG'ETO/76

BETWEEN

JACK MATHAGU MURIUKI 1ST PETITIONER

JANE WANGARI MURIUKI 2ND PETITIONER

JASON MBOGO MURIUKI 3RD PETITIONER

DOUGLAS KING'ANG'I MURIUKI 4TH PETITIONER

MERCY NJERI MURIUKI 5TH PETITIONER

DOROTHY NYAWIRA MURIUKI 6TH PETITIONER

LUCY WANJIKU MURIUKI 7TH PETITIONER

AND

MERCY NJERI NJAGI RESPONDENT



RULING

1. This Ruling relates to the Respondent's Notice of Preliminary Objection dated 26th August 2024. The Respondent by the Preliminary Objection seeks to have the Petition dismissed and struck out with costs, arguing that it is barred by the doctrine of *Res Judicata*, pursuant to Section 7 of the [Civil Procedure Act](#), Cap 21 of the Laws of Kenya. The Respondent asserts that the issues raised in the Petition were directly contested in the following cases: High Court Civil Appeal Number 29 of 1987, High Court Civil Case Number 233 of 1994, High Court Miscellaneous Application No. 9 of 2007, and [ELC](#) No. 31 of 2023, in which both the Petitioners and the Respondent were parties.
2. The Notice of Preliminary Objection was raised in reference to the Petition dated 19th March 2024, in which the petitioners prays for the following orders:
 1. A declaration do issue that a customary trust is created in favour of Mr. Muriuki Jason pursuant to the register of members of the Mworria sub-clan of the agaciku Clan minutes of 12th January 1955.
 2. A declaration do issue that the late Njagi Samson and his successors in title held and continue to hold land parcel number Ngariama/Rung'eto/XX in trust for Muriuki Jason deceased and his heirs.
 3. A declaration do issue that the registere of members of the Mworria sub-clan of the Agaciku Clan minutes of 12th January 1955 does create an overriding interest over land parcel number Ngariama/Rung'eto/XX in favour of Muriuki Jason (deceased) over the registered proprietor Njagi Samson (deceased) and his successors in title.
 4. A declaration do issue that any registration, transmission, subdivisions and/or dealings in land parcel number Ngariama/Rugn'eto/XX before the determination of the trust is illegal, null and void.
 5. An order that the late Njagi Samson and his successors in title hold land parcel number Ngariama/Rung'eto/XX in trust for Muriuki Jason and his estate.
 6. An order of rectification rectifying the register to read Muriuki Jason and his estate.
 7. An order of cancellation and/or revocation of all subsequent title Ngariama/Rung'eto/2XX2, 2XX3, 2XX4, 2XX5, 2XX6, 2XX7 and 2XX8 emanating from the subdivision of land parcel number Ngariama/Rung'eto/XX.
 8. Cost of this application be provided.**
3. The Petition is based on the grounds outlined on its face and the accompanying affidavit sworn by Jack Mathagu Muriuki and Jane Wangari Muriuki, representing the other petitioners. The Petitioners assert that they are siblings and that their families reside on land parcel number Ngariama/Rung'eto/XX (referred to as the "suit land"). They aver this land was allocated to their father, Muriuki Jason, on or before 1955. They contend that although their father was adjudicated as the beneficiary of the suit land, he passed away soon after before the processes of land demarcation, adjudication, and registration were completed. According to the petitioners, the elders of the Mworria sub-clan of the Agaciku clan decided that Njagi Samson (the deceased husband of the Respondent) would hold the land in trust for the Muriuki Jason family. They explain that Muriuki Jason had no sons at the time of his death, and



- since women were not permitted to be registered as landowners, Njagi Samson, Jason's Nephew, was chosen to hold the land on behalf of the family.
4. The petitioners argue that the land was registered in Njagi Samson's name when he was still in Primary School and assert that he settled on the suit land around 1969. This was the period when the Petitioners and their deceased mother began to experience threats of eviction from the Respondent's family. They recount the history of various Court cases related to the suit land and aver that none of the decisions made in those cases dealt and/or determined the merits of their claim. They argue that the issue of whether Njagi Samson(deceased) held the suit land in trust for the Muriuki family had never been resolved in a fair trial in a Court of law, which they contend infringed upon the Petitioners' right to a fair trial as guaranteed under Article 50(1) of the Constitution of Kenya. The Petitioners claim that they have been denied equal protection and benefit of the law, as well as equal enjoyment of all rights and fundamental freedoms. They assert that their rights to property and to a fair hearing, as enshrined in the Constitution of Kenya, have been violated.
 5. In addition to the notice of preliminary objection, the Respondent filed a Replying Affidavit attaching a copy of this Court's Ruling delivered on 15th February 2024 where he averred the Court provided a detailed account of the history of the suits commenced and determined concerning the suit land and the parties involved. The Respondent asserted that no provisions of the Constitution had been violated, as alleged by the Petitioners. She further averred that the 2nd to 7th Respondents did not have the authority to swear the Affidavit as they were not Administrators of the deceased estate. She contended the doctrine of res judicata having regard to all the previous cases was applicable in the instant Petition.
 6. The Court on 19/9/2024 gave directions that the Preliminary Objection be disposed of first and that it be canvassed by way of written submissions. The parties duly filed their written submissions as per the Court's directions.
 7. I have considered the notice of Preliminary Objection, the Petitioners Constitutional Petition, the Respondent's Replying Affidavit and parties' submissions. It is evident from the record that the dispute in regard to the subject land parcel Ngariama/Rungeto/XX has been alive for now well over five decades and has given rise to a multiplicity of suits in various Courts which have been determined, concluded and/or resolved in one way or the other. The singular issue for determination in the instant Preliminary Objection is whether the Petition herein is res judicata by reason of the previous proceedings.
 8. At the outset, it is noteworthy that the Petitioners have either through persons under whom they claim and/or jointly have before various Courts of Law initiated multiple suits where the suit land namely Ngariama/Rungeto/XX has been the subject matter. The first of these cases and from which all the other subsequent cases stem, was Nyeri Resident Magistrate's Court Civil Case Number 1065 of 1963. In this case, on 12th June 1973, when it had been scheduled for hearing, the Plaintiff Wandia w/o Muriuki who was the Petitioners mother (now deceased) failed to attend the Court and the Defendant's Counsel applied to have the suit dismissed for non attendance and for want of prosecution. The Learned Magistrate dismissed the suit for want of prosecution and on the basis that the Court did not have jurisdiction as the claim involved trust and trustees which it did not have jurisdiction to handle. The Magistrate additionally added as the matter involved a first registration under Section 143 of the Registered Land Act, he had no power or jurisdiction to order rectification of the title register. The Magistrate's Court therefore unequivocally held it had no jurisdiction to deal with the matter before it as it lacked jurisdiction.



9. The Respondent's Preliminary Objection is premised on the plea that the Petition herein is resjudicata by dint of Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya. The Respondent in the Notice of Preliminary Objection pleads as follows:-

“The issues herein were directly in issue in High Court Appeal No. 29 of 1987; Court of Appeal Judgment and finally High Court Civil Case No. 233 of 1994 Judgment and finally High Court Miscellaneous Application No. 9 of 2007 which were heard and finally decided by High Court and held by Court of Appeal, more recently in the Ruling of Justice Mutungi on 15th day of February 2024 in ELC No. 31 of 2023 where the Applicants and the Respondents were party to the case.”

10. The doctrine of Res judicata is embodied under Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya which provides as follows:-

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.

11. The Petitioners contention is that the primary issue as between them and the Respondent and/or those claiming through her has never been heard and determined by a Court of competent jurisdiction and thus they have been denied their Constitutional right of being heard in a fair trial. The issue being whether or not the late Njagi Samson and his successors in title held land parcel Ngariama/Rung'eto/XX in trust for Muriuki Jason (deceased) and his heirs. As observed earlier in this Ruling the genesis of all the subsequent suits and Appeals stem from the dismissal of Nyeri Resident Magistrate's Court Civil Case No. 1065 of 1963. This suit as observed was not heard on merits as on the date scheduled for hearing, the Plaintiff, Gladys Wandia, who was the Petitioners mother was absent and the Court dismissed the suit for want of prosecution and in any event noted that it lacked jurisdiction to deal with the matter. In essence therefore the Court downed its tools. The Court essentially therefore was not a competent Court to try the issues before it. In those circumstances can it be said there was a final determination of the issues that fell to be determined? I do not think so, as the Court that would have determined the issues unequivocally stated it lacked jurisdiction to deal with the issues raised in the suit.

12. The Respondent/applicant in support of the Preliminary Objection has argued the issues raised in the Petition were directly and substantially in issue in the previous suits hence rendering the same res judicata. I have held that Nyeri Resident Magistrate Civil Case No. 1065 of 1963 did not finally determine the issues raised in the suit as it held it lacked jurisdiction. In the subsequent case Embu Senior Resident Magistrate Civil Case No. 82 of 1982 and the subsequent Appeals arising therefrom being Nyeri HC Civil Appeal No. 29 of 1987 and Nyeri Court of Appeal Civil Appeal No. 177 of 1991, the High Court allowed an Appeal arising from a decree where following a reference of the matter to arbitration by a panel of elders, the elders determined that the suit land be partitioned into two portions between the Petitioners family and the Respondent's family. The High Court set aside the orders emanating from the Tribunal on the basis the Tribunal had no jurisdiction to adjudicate on title to land and declared the decision a nullity. The Court of Appeal upon Appeal by Gladys Wandia held the Appeal was without merit and observed the suit was Res judicata Nyeri RMCC No. 1065 of 1963.

13. Further Nyeri HCCC No. 233 of 1994 where Gladys Wandia had sought to have the dispute referred to the DO Gichugu for arbitration was dismissed on 22nd February 2001 on the basis that the suit was



res judicata. An Appeal before Nyeri Court of Appeal No. 87 of 2001 was equally dismissed by the Court holding that the suit was Res judicata.

14. Not deterred, the Petitioners instituted a Land Disputes Tribunal Case No. 48 of 2005 where an award was given and was adopted by the Resident Magistrate's Court Kerugoya as LDT Case No. 52 of 2006 and a decree issued on 7th August 2006. Dissatisfied by the award the Respondent filed a Judicial Review application vide Embu HC Misc application No. 9 of 2007 and on 9th December 2010 the High Court rendered a Ruling quashing the award given by Gichugu Land Dispute Tribunal in case No. 48 of 2005 and the Judgment and orders issued by the Resident Magistrate Court Kerugoya in Land Dispute Tribunal Case No. 52 of 2006 on 7th August 2006.
15. The Petitioners have further argued that Nyeri Constitutional Petition No. 11 of 2014 did not conclusively determine or hear the issue of trust pleaded as the same was dismissed for want of prosecution on 31st July 2018 and was not heard on merits.
16. As regards Kerugoya ELC No. 31 of 2023 commenced by way of Originating Summons, the Petitioners aver that the same was dismissed vide a Ruling dated 15th February 2023 on the basis that the suit "raises the same claim as that raised in the previous suit which were heard and determined". The Petitioners contend that in none of all the referenced cases was the issue whether or not the suit land was held in trust by Njagi Samson for his own behalf and on behalf of the Petitioners, ever determined finally and that the issue remained alive and was not res judicata having not been determined by any competent Court.
17. The *Black's law Dictionary* defines Res judicata as:

"An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties."

18. In the Case of *Qayrat Foods Limited V Safiya Ahmed Mohamed & 6 others* (2020) eKLR the Court cited *James Karanja alias James Kioi (Deceased)* (2014) eKLR, where the Court outlined the conditions under which the doctrine of res judicata would be applicable as follows:-

"For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated; (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c) that a Court competent to try it had heard and finally decided the matters in controversy between the parties."

19. In the Case of *C. K. Bett Traders Ltd & 2 Others -vs- Kennedy Mwangi & Another* (2021) eKLR Chacha Mwita, J observed as follows in regard to the application of the doctrine of Res judicata:-

"Res judicata is normally pleaded as a defence to a suit or cause of action that 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.

In other words, Res judicata will successfully be raised as a defence 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 on substantially in issue in the previous suit as in the current suit and they were conclusively determined by a Court of competent jurisdiction”. (emphasis added).

20. The Court of Appeal in the Case of the *Independent Electoral and Boundaries Commissioner –vs- Maina Kiai & 5 Others* (2017) eKLR set out the ingredients that a plea of Res Judicata must satisfy for the same to be held to be applicable. The Court stated as follows:-

“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 party or parties under whom 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.

21. It is incontestable that Nyeri RM Case No. 1065 of 1963 was the first case where the issue of trust was pleaded by the Petitioners deceased mother. The Learned Senior Resident Magistrate in his Ruling on 12th June 1973 inter alia stated thus:-

“Since the Plaintiff is absent today on the hearing date of this trial, I dismiss this case for want of prosecution. Secondly, I am satisfied from para (4) of the Complaint that this is a matter of trust and trustees. By the Trustee Act, Cap 167 of the Laws of Kenya, only the High Court has jurisdiction to adjudicate matters on trusts and trustees. This being so, I hold I have no jurisdiction to try this suit. Accordingly this suit is dismissed with costs”.

22. The Court in the premises determined it was not a competent Court to determine the issue of trust and accordingly it cannot be contended that the issue whether or not the suit land was held in trust was finally and conclusively determined by a competent Court. The suit RM CC. No. 1065 of 1963 was dismissed without the issue being tried and a determination made in regard to the same. In the Case of *Mumira –vs- Attorney General* (2022) KEHC 271 (KLR) Mativo, J (as he then was) emphatically stated a dismissal of a suit for want of prosecution cannot be equated to having the suit being heard and determined on merits. At Paragraph 14 of his Ruling he stated as follows:-

“From the jurisprudence discussed earlier, it is clear that the previous suit must have been determined conclusively and a final Judgment rendered on merits. Even in *Njue Ngai –vs- Ephantus Njiru Ngai & Another*, the Court in the above underlined sentence, the Court cited authorities/decisions stating that there must be a determination on the main questions. Turning to this case, the question is whether a dismissal for want of prosecution can be termed as a final determination on merits. In *Cosmas Mrombo Moka –vs- Cooperative Bank of Kenya Ltd & Another* the High Court dismissed a similar objection raised in the Petition declining to buy the arguments raised in this Petition. Also, in *Moses Mbatia –vs- Joseph Wamburu Kihara* the Court held that dismissal of a suit for non attendance or want of prosecution is not synonymous with a suit that has been heard and determined. On this



ground alone the Respondent's argument that dismissal of a suit for want of prosecution constitutes res judicata collapses."

23. In the instant case it was only in Nyeri RMCC No. 1065 of 1963 that the issue of trust stood to be tried and decided on merit. It was not as the suit was dismissed for nonattendance and want of prosecution. The Magistrate also held he lacked jurisdiction to try and determine the issue of trust that had been pleaded. The Court was therefore not a competent Court that could have finally and conclusively determined the issue of trust that is now raised as the main issue in the instant Petition.
24. No Appeal was preferred against the Ruling by the Learned Magistrate in RMCC No. 1065 of 1963. The Civil case Embu RMCC No. 68 of 1982 was referred to arbitration and the Arbitration Committee made a decision for the suit land to be partitioned but on Appeal to the High Court the Arbitration Tribunal's decision was held to be a nullity as they acted beyond their jurisdiction. The High Court further held the suit was res judicata on account of Nyeri RMCC No. 1065 of 1963. The Court of Appeal equally in a subsequent Appeal upheld the High Court decision that Embu RMCC No. 68 of 1982 was res judicata by reason of Nyeri RMCC No. 1065 of 1963. That scenario was repeated when the Petitioner's mother filed Nyeri HCCC No. 233 of 1994 and an Appeal thereof after the High Court dismissed the suit on account of being Res judicata. Recently some of the Petitioners instituted Kerugoya ELC No. 31 of 2023 where this Court equally dismissed the Originating Summons on the basis that the suit was res judicata.
25. Having regard to the jurisprudence referred to herein above and being cognizant of the applicable law, I am persuaded that indeed the Petitioners, and before them their deceased mother, have never had the issue whether or not the late Njagi Samson (deceased) was registered to hold land parcel Ngariama/Rungeto/76 in trust for his family and the Petitioners family. There has not been any final decision on that issue and hence the issue of res judicata would not be applicable. In the cases referred to by the Respondent in support of the plea of res judicata there is not one case where the issue of trust was tried and determined on merit. Nyeri RMCC No. 1065 of 1963 was dismissed for want of prosecution and want of jurisdiction on the part of the Court yet it has been that case that was the fulcrum of the res judicata plea and it has been on account of that case that the plea of res judicata has been upheld all along. I have carefully considered and reviewed the matter and I am satisfied Nyeri RMCC No. 1065 of 1963 having not finally determined the issue of trust, the instant Petition cannot be res judicata as the issue of trust was never considered and determined by a Court of competent jurisdiction. The Court itself in Nyeri RMCC No. 1065 of 1963 stated it lacked jurisdiction to determine the issue of trust that had been raised.
26. I am cognizant of the fact that various Courts have in various suits/appeals determined the claim as between the Petitioners and the Respondent is res judicata having regard to the previous cases. There has however been no demonstration that the issue of trust was ever heard and determined in any of those previous cases. I have found and held that indeed the issue has never been ventilated and determined on merits and to that extent I cannot say the Petitioners have had a fair hearing and a fair trial as envisaged under Article 50(1) of the Constitution. The Petitioners are entitled to fair Administrative action and are entitled to be heard on any matter that is likely to affect their rights and/or interests. It is only by the Petitioners being afforded the opportunity to be heard, will the issue whether or not a trust was created in their favour when Njagi Samson (deceased) was registered as proprietor of land parcel Ngariama/Rung'eto/XX be determined finally and conclusively.
27. The upshot is that I hold and find the doctrine of res judicata is not applicable in the circumstances of this case. I over rule the Preliminary Objection and direct that the Petition proceeds to be heard on merit. The cost of the Preliminary Objection will abide the outcome of the Petition.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 8TH DAY OF
MAY 2025.**

J. M. MUTUNGI

ELC - JUDGE

