



**Mwihuri & another v Agricultural Finance Corporation & another (Environment and Land Appeal E004 of 2024) [2025] KEELC 6080 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E004 OF 2024  
JO OLOLA, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**CHARLES NJERU MWIHURI ..... 1<sup>ST</sup> APPELLANT**

**VERONICA WANJA GITHINJI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**ANDREW GITHINJI MWIHURI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal arising from the Ruling of the Honourable M. Okuche, SPM delivered on 19th December, 2023 in Nyeri CMELC Case No. E068 of 2023)*

**JUDGMENT**

**Background**

1. This is an Appeal arising from the Ruling of the Honourable M. Okuche, SPM delivered on 19<sup>th</sup> December, 2023 in Nyeri CMELC Case No. E068 of 2023
2. By a Complaint dated 28<sup>th</sup> August 2023, Charles Njeru Mwihuri and Veronica Wanja Githinji (the Appellants herein) had sought judgment against the Respondents for orders as follows:
  - a. The 1<sup>st</sup> Defendant be directed by this Honourable Court to partially discharge the charge registered over parcel of land LR No. Tetu/Kiriti/69 for purposes execution of the judgment dated 12<sup>th</sup> November, 2018;
  - b. The 2<sup>nd</sup> Defendant be at liberty to charge and/or sell the distinct portion measuring 0.765 Ha belonging to the 2<sup>nd</sup> Defendant herein to recover their interest with the 1<sup>st</sup> Respondent; and
  - c. The costs of this suit be borne by the Defendants.



3. The basis of those prayers was the Appellants' contention that at all material times they were the beneficial owners of 0.765 Ha of the suit property which was held together with the 2<sup>nd</sup> Respondent. The Appellants averred that a judgment delivered in Nyeri ELC No 37 of 2018 did find that the 2<sup>nd</sup> Defendant's title was encumbered by customary trust for his benefit and the two named Defendants and the Appellants herein.
4. It was the Appellants' case that when they attempted to register the order with the County Land Registrar, they realised that the 2<sup>nd</sup> Defendant had registered a charge over the subject land in favour of the 1<sup>st</sup> Defendant without the consent of all beneficiaries. It was the Appellants' case that the 1<sup>st</sup> Defendant ought to discharge the charge to enable subdivision of the land and the transfer to the beneficiaries.
5. Contemporaneously filed with the suit was a Notice of Motion dated 28<sup>th</sup> August 2023 and filed on an even date wherein the Appellants had sought the following orders against the respondents herein:
  1. The Honourable Court be pleased to issue conservatory orders in regard to the parcel of land known as Tetu/ Kiriti/ 69 to maintain status quo pending the hearing and determination of this suit;
  2. The 1<sup>st</sup> Respondent/Defendant or their servants and /or agents be restrained by a temporary injunction from disposing the parcel of land known as LR No. Tetu/Kiriti/69 or dealing with the same in any manner detrimental to the interest of the Applicants pending the hearing and determination of this application and suit;
  3. The 1<sup>st</sup> Respondent /Defendant, their servants and /or agents be restrained by a temporary injunction from interfering with the Plaintiffs/Applicants' possession and use of LR No. Tetu/Kiriti/69 pending the hearing and determination of this application and suit; and
  4. The cost of this Application be borne by the Respondents herein.
6. In response to the application, the Agricultural Finance Corporation (the 1<sup>st</sup> Respondent) filed a response opposing the same. In a Replying Affidavit sworn by its Chief Legal Services Officers Mainga Evans E. on 25<sup>th</sup> September 2023, the 1<sup>st</sup> Respondent asserted that on or about 14<sup>th</sup> May 2010, the 2<sup>nd</sup> Respondent applied for an agricultural loan in the sum of Kshs. 300,000/= to be repaid within a period of 3 years and offered the suit property as security.
7. The 1<sup>st</sup> Respondent further asserted that the 2<sup>nd</sup> Respondent thereafter defaulted on the loan repayment and he was subsequently issued with a 45 days redemption notice which he did not comply with. It was the 1<sup>st</sup> Respondent's case that the issues raised in the application before the trial court were similar to those raised in MCL&E No. 37 of 2018 which was dismissed by the court with costs awarded to the 1<sup>st</sup> Respondent.
8. In response to the application, Andrew Githinji Mwihuri (the 2<sup>nd</sup> Respondent) swore a Replying Affidavit wherein he admitted that the land is subject to a customary trust and that the Appellants herein are entitled to 1.9 acres out of the land. In addition, the 2<sup>nd</sup> Respondent admitted that the land was subject to a charge. It was his case that the 1<sup>st</sup> Respondent is a financial organization craving the mercy of the court after it engaged in unprofessional conduct. It was further his case that the Appellants should not advise the 1<sup>st</sup> Respondent on how to utilize 0.76 Ha out of the suit land.
9. Having heard the parties and in his Ruling delivered on 19<sup>th</sup> December, 2023, the Learned Trial Magistrate held that the issues raised by the Appellants were res judicata in view of the earlier



proceedings in ELC No. 37 of 2018 and proceeded to dismiss the application with costs to the Respondents.

10. Aggrieved by the said determination, the Appellants moved to this court and lodged a Memorandum of Appeal dated 19<sup>th</sup> January 2024 urging this court to set aside the judgment of the Lower Court on some three (3) grounds framed as follows:
  1. That the Learned Magistrate erred in law and fact by misapprehending the nature of the proceedings in the lower court in CMELC E068/2023 vis-a-vis the proceedings in CMELC E37/2018 and effectively dismissed the suit on the grounds that the issues raised by the Appellants were res-judicata even though the trial Court in Nyeri CMELC 37/2018 had refused to adjudicate itself on the issue of charge and instructed the Appellants to file another substantive suit;
  2. The Learned Magistrate erred in law and facts by failing to consider the appellants pleadings in the lower Court which would have disclosed that the first suit was in regard to whether there existed customary trust over the parcel of land known as Tetu/Kiriti/69 while the second suit was in regard to the removal of a charge over Tetu/Kiriti/69 by the 1<sup>st</sup> Respondent; and
  3. The Learned Magistrate erred in law and facts by finding that the suit was res-judicata even though the issue of whether the charge over Tetu /Kiriti/69 had never adjudicated upon on merit (sic).
11. It is now settled that the duty of the first appellate court such as this one is to re-evaluate the evidence which was adduced in the subordinate court both on the facts and the law and to arrive at its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [see *Selle & Another –vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123].
12. Accordingly, I have carefully perused and considered the Record of Appeal as well as the impugned judgment. I have similarly perused and considered the submissions as filed by the 2<sup>nd</sup> Respondent herein. I was unable to find any other submissions filed by the other parties.
13. By their suit as filed before the Lower Court, the Appellants had sought for an order that the 1<sup>st</sup> Respondent herein be directed to partially discharge the charge registered over the parcel of land known as LR. No. Tetu/Kiriti/69 for purposes of execution of the judgment delivered on 12<sup>th</sup> November, 2018 and which they had obtained in a different suit being Nyeri CMELC Case No. 37 of 2018. In addition, the Appellants sought for an order that the 2<sup>nd</sup> Respondent be at liberty to charge and/or sell a distinct portion measuring 0.765Ha to the 1<sup>st</sup> Respondent for purposes of recovering the loan owed to the 1<sup>st</sup> Respondent.
14. By the Notice of Motion filed contemporaneously with the suit, the Appellants sought for conservatory orders to preserve the status quo in regard to the suit property. In addition, the Appellants sought for temporary orders restraining the Respondents from disposing off or interfering with the Appellants possession of the suit property.
15. In response to the application, the 1<sup>st</sup> Respondent asserted that both the application and the suit raised similar issues that had been canvassed and were dismissed in the said Nyeri CMELC Case No. 37 of 2018. It was accordingly the 1<sup>st</sup> Respondent's case that both the application and the suit were res judicata.



16. Having heard the parties on the issues raised, the Learned Trial Magistrate concluded as follows at Page 3 to 4 of the Judgement (Pg. 112 to 113 of the Record):

“...The court have considered the same interest of this court (in) Civil Suit No. Nyeri CMCC No. 37 of 2018 in which the Applicants sought for the following orders:

- a. That pending the hearing and determination of this application, the Respondent, their servants and / or agents be restrained by a temporary injunction from interfering with the Applicants possession and use of LR. No. Tetu/Kiriti/69;
- b. That the 2<sup>nd</sup> Respondent be compelled to partially discharge the charge registered on LR No. Tetu/Kiriti/69 to effect execution as per the court order of the Honorable Court for the Applicants to get their share;
- c. That upon execution, the 1<sup>st</sup> Respondent be at liberty to charge and /or sell the distant portion belonging to the 2<sup>nd</sup> Defendant herein to recover their interest with the 1<sup>st</sup> Respondent.

This application was dismissed. The court therein also noted that the suit was filed to determine whether the 1st Respondent was the registered owner of the suit land that the court found that the 1<sup>st</sup> Respondent interest in the land was encumbered by a customary trust in favour of the Applicants. At the time of filing that suit in 2016, the charge on the suit land was existing. One of the parties raised this issue to be determined by the court.

In this court's view the issues raised by the Applicants herein is res-judicata suit No. ELC No. 37/2018. The principle of finality must come to the aid of this court to stop vexatious claims from dogging the operations of this court. The application is dismissed with costs to the Respondents.”

17. The doctrine of res-judicata is captured under the provisions of Section 7 of the [Civil Procedure Act](#) 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.”

18. Considering the doctrine in the case of IEBC –vs- Maina Kiai & 5 Others (2017) eKLR, the Court of Appeal held that:-

“... 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. The former suit was between the same parties and 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”.
19. In the matter herein, there was no dispute that the parties in this matter were the same ones who had litigated in the said Nyeri CMELC No. 37 of 2018. From a perusal of the record, the Appellants herein were the Defendants in the said suit while the 2<sup>nd</sup> Respondent herein was the Plaintiff. The 1<sup>st</sup> Respondent was added as a party to that suit at the point of execution following an application wherein the Appellants sought for orders for the 2<sup>nd</sup> Respondent to be compelled to partially discharge the charge registered with the 1<sup>st</sup> Respondent over the suit property.
20. By way of an application dated 19<sup>th</sup> April 2023, the Appellants had sought for the following orders:
- a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this Application, the Respondents, their servants and/or agents be restrained by a temporary injunction from interfering with the Applicant’s possession and use of LR No. Tetu/Kiriti/69;
  - d. That the 2<sup>nd</sup> Respondent be compelled to partially discharge the charge registered on LR No. Tetu/Kiriti/69 to effect execution as per the Court order of the Honourable Court for the Applicants to get their share; and
  - e. That upon execution, the 1<sup>st</sup> Respondent be at liberty to charge and /or sell the distinct portion belonging to the 2<sup>nd</sup> Respondent herein to recover their interest with the 1<sup>st</sup> Respondent.
21. It was therefore undeniable that the orders sought in the former sought concerning the charge registered with the 1<sup>st</sup> Respondent were similar to those sought in the matter herein. However, while it is indeed true that the Appellants’ Motion dated 19<sup>th</sup> April, 2023, was dismissed in the former suit by a Ruling delivered on 7<sup>th</sup> June, 2023, it was apparent that the court did not deal with the issue of whether or not the charge placed on the suit property was irregular. This was because, as the court did find, the issue was being raised at the execution stage and was not part of the issues raised when the suit was filed.
22. That the court declined to deal with the issue and to make a determination thereon can be discerned from paragraphs 22 and 23 of the Ruling of the Honourable M. M. Gituma wherein the Learned Magistrate came to the following conclusion:
- “22. In my opinion, when the court issued its ruling on 21<sup>st</sup> April, 2022, the court became functus officio. The issue being raised now on the discharge of the charge is not one that can be said to align with the execution process. This is a novel issue, outside of the issues raised when this suit was filed, that ought to be comprehensively determined by the court. The court needs to hear the parties on how the charge was placed; was there a loan facility that was advanced to the 1<sup>st</sup> Respondent and whether the placement of the charge was irregular as there was a pending matter before the court. These are not issues that can be determined by way of an application; and
  23. For these reasons, the application dated 19<sup>th</sup> April, 2023 is hereby dismissed. The parties are advised to file a suit on the issue of the discharge of the charge.”



23. Arising from the foregoing, it was clear to me that the issue concerning the charge registered with the 1<sup>st</sup> Respondent had not been fully heard and finally determined in the former suit. The Agricultural Finance Corporation (the 1<sup>st</sup> Respondent herein) had not been enjoined as a Defendant in the former suit. The issue of the discharge of the charge was not an issue that had been directly and substantially in issue in the former suit as the 1<sup>st</sup> Respondent was only brought in after judgment in an erroneous attempt at execution after the Appellants hit a dead end.
24. In the premises, I am persuaded that there was merit in this Appeal and that the Learned Trial Magistrate fell in error when he came to the conclusion that the suit the subject matter of this Appeal was res judicata.
25. Accordingly, I hereby allow the Appeal, set aside the Ruling dated 19<sup>th</sup> December 2023 and hereby direct that the suit as filed in the Lower Court be allowed to proceed for hearing on merit. For purposes of maintenance of order, the status quo prevailing as at 19<sup>th</sup> December 2023 shall be maintained pending the hearing and determination of the said suit.
26. Each party shall bear their own costs.

**JUDGEMENT DATED, SIGNED AND DE LIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025**

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**J.O. OLOLA**

**JUDGE**

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Mbau Advocate for the Appellants
- c. Ms. Kinoti Advocate for the 1<sup>st</sup> Respondent
- d. No Appearance for the 2<sup>nd</sup> Respondent

