



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CONSTITUTION PETITION NO. 18 OF 2019

FORMERLY PETITION 37 OF 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA AND ARTICLE 22 THEREOF

IN THE MATTER OF : ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF : ALLEGED VIOLATIONS OF ARTICLES 20,21,40,45,47,48,73, OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION AND REANABLENESS

AND

IN THE MATTER OF: RULE OF LAW, UNJUST LAWS AND EMERGING INTERNATIONAL CONSTITUTIONAL AND PROPERTY LAW

AND

IN THE MATTER OF: THE BANGALORE PRINCIPLES

AND

IN THE MATTER OF: CUSTOMARY LAW (KIKUYU)

BETWEEN

ISAAC MUGO KAMU

PAUL MURIGI KAMAU

JOSHUA NJEKE KAMAU

JAMES MWANGI KAMAU

PAUL MURIGI KAMAU

DAMIEL MWANGI KAMAU

PETER MAINA KAMAU

DANIEL MWANGI KAMAU

PETER MAINA KAMAU

JOSPEH WAINAINA KAMAU

EBRAHIM MURIITHI KAMAU.....PETITIONERS

VERSUS

STEPHEN GITAU IKERE

LOISE NYOKABI IKERE

LUCY NYAMBURA IKERE

IKERE GITAU.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LAND.....3RD RESPONDENT

J U D G M E N T

1.The petitioners filed the petition dated 7th December 2011 which was subsequently amended on 30th October 2018 to reflect the substitution of Ikere Gitau (deceased) the 1st respondent, with the administrators of his estate following an application made in that regard by the petitioners. The 1st petitioner, Kamau Tichu is the registered owner of land parcel **LR No. Nyandarua/South Kinangop/430** (“the suit land”) whilst the other petitioners are his siblings who have resided and settled on the said land. The 1st respondent (deceased) was registered owner of the adjacent land parcel **LR. No.Nyandarua/South Kinangop/431**.

The Petitioners Case.

2.The 1st petitioner has averred that he was allocated the suit land on 3rd September 1963 by the then Ministry of Settlement and that the land allocated to him was a total of 66 acres. The petitioners have further averred that even though they took possession and occupied the entire 66 acres, the 1st petitioner’s land was at the time of registration around 1985 reduced in acreage without any reference to him. The portion that was apparently reduced from the 1st petitioner’s land was allocated to the 1st Respondent who was issued title in respect of the same. The portion of land the 1st petitioner claims was part of the land allocated to him, but was unlawfully and illegally allocated to the 1st respondent (deceased) measured approximately 30 acres. It is the 1st petitioner’s contention that he was in lawful possession and occupation of the portion of land allocated to the 1st Respondent and that the 3rd respondent could not properly and arbitrarily vary the allotment made to the 1st petitioner without reference to him. The 1st petitioner argues it was a violation of his fundamental right to property for the 3rd Respondent to deprive him of his land without adherence to due process. He averred this was a violation of the constitution.

3. The petitioners conceded there have been suits relating to the ownership, possession and occupation of land parcels Nyandarua/South Kinangop/430 and Nyandarua/South Kinangop/432 between the 1st petitioner and the 1st respondent (now deceased). Notably vide a judgment delivered in Nairobi HCCC No.395 of 1997 Honourable Justice J.B Ojwang (as he then was) made a determination respecting the ownership occupation and possession of the suit land. The Court held that the 1st respondent was the rightful owner of LR No. Nyandarua/South Kinangop/431 and that the 1st petitioner was in trespass thereon and ordered for the eviction of the 1st petitioner from the portion of the land he had occupied; and in addition the 1st petitioner was ordered to pay damages and mesne profits.

4. The 1st petitioner has faulted the basis of the judgment of the High court arguing that the court failed to consider that there was evidence and admission on the part of the settlement Ministry that the 1st Respondent was allocated the land in error considering that the land had already been allocated to the 1st petitioner. The 1st petitioner explained that his sons had in line with kikuyu customary law taken individual portions of the disputed land and had established their homesteads thereon where they resided with their families. The petitioners expressed the view that they had legitimate expectation that having been allocated 66 acres and having occupied the whole land up until 1985, a title for the whole 66 acres would be issued to the 1st petitioners. The petitioners argued that if the judgment in HCCC No. 395 of 1997 was executed it would be in furtherance of the gross violation of their fundamental rights and would result in rendering the petitioners destitute and homeless.

5. The petitioner consequently in the petition prayed for orders: -

(a) An injunction restraining the respondents their agents, servants and/or employee from in any way interfering with the petitioner’s quiet possession of the premises know as L.R Nyandarua/South Kinangop/430 and 431 as currently occupied by the petitioner and their extended families.

(b) A declaration that the respondents are violating the petitioners right to property as guaranteed by Article 40 of the constitution.

(c) A Declaration that the 2nd respondent has failed to protect the right of the petitioners as guaranteed by Article 20 and 21 of the

constitution.

(d) A Declaration that the 2nd and 3rd respondent have violated the petitioners freedom under Article 47 as guaranteed by the constitution.

(e) An order directing the 2nd and 3rd respondents to recall the unconstitutional title deeds and replace the same with others reflecting and observing the petitioner's constitutional rights as hereinbefore brought out.

(f) A Declaration that the judgment delivered in Nairobi HCCC 395 of 1997 violates the petitioners' fundamental rights as herein mentioned.

(g) An order removing the said judgment into this court and quashing the same for being unconstitutional.

The 1st Respondent's Case.

6. The 1st respondent's response to the petition and application for conservatory orders as per the replying affidavit sworn by the 1st respondent was that all matters complained of had been the subject matter of adjudication by a competent court and that the present matter constituted abuse of the court process. The 1st respondent contended this court lacked jurisdiction to entertain the matter as to do so would amount to sitting on appeal on the judgment of Ojwang, J in HCCC No.395 of 1997 which judgment was annexed. It was the 1st Respondent's position that the court in the earlier suit had adjudged the petitioners to be trespassers on his land and ordered their eviction. The 1st Respondent asserted that the dispute between him and the 1st petitioner has been litigated before various courts in HCCC No. 1727 of 1985; HCCC No. 34 of 1990; Civil Appeal No. 125 of 1994; and Misc HC Application No.1151 of 2000 (J/R) and that in all the matters the 1st respondents claims were dismissed.

The 2nd and 3rd Respondents response

7. The Attorney General on behalf of the 2nd and 3rd Respondents filed a preliminary objection dated 28th November 2014. Inter alia the Attorney General contended the matter as presented concerns ownership of land and does not satisfy the threshold to be raised as a constitutional issue. Further, the Attorney General averred the issues in dispute have been adjudicated by a competent court and hence the matter is res judicata. In further response filed by the Attorney General on 21st September 2020 the Attorney General inter alia reiterated that the petition was res judicata as all the issues raised in the petition were canvassed and finally determined in Nairobi HCCC No. 395 of 1997. The AG contended the petition did not meet the threshold of what constitutes a constitutional petition as established in the case of *Anarita Karimi Njeru -vs- Republic (1979) eKLR*.

The Petitioners reply

8. The 1st petitioner in a further affidavit sworn on 30th November 2020 in response to the response filed by the Attorney General on behalf of the 2nd and 3rd Respondents contended the response was by a stranger (state counsel) rather than by the 2nd and 3rd respondents expressly. He contended the state counsel could not factually assert the validity and/or genuineness of any documents referred to in the proceedings as he/she was not the custodian of the documents.

9. The petition was argued by way of written submissions. The petitioners counsels and the 1st respondent's counsel made oral submissions by way of highlighting their respective submissions. The 2nd and 3rd respondent did not make any oral submissions and relied on their filed submissions.

Submissions of the Petitioners

9. Dr. Khaminwa advocate and Mr. Njugi advocate highlighted the submission of the petitioners before me on 9th December 2020. The petitioners primary submission were filed on 18th June 2019 and the further submissions on 11th December 2020. On the basis of the pleadings and the submissions made by the parties it is apparent that the issues that stand out for determination are firstly; whether the petition is res judicata by reason of the judgment in Nairobi HCCC No.395 of 1997; secondly, whether the petition meets the requisite threshold to be sustained as a constitutional petition; and thirdly, whether the court has jurisdiction to quash the judgment of the High Court which is a court of equal status to this Court.

10. Dr. Khaminwa the lead counsel for the petitioners forcefully submitted the instant suit was not res judicata by reason of the judgment in Nairobi HCCC No.395 of 1997 delivered on 14th July 2010. He argued that the earlier suit had not raised any constitutional issues which the petition raised and that other than the 1st petitioner, all the other petitioners (2nd to 14th) were not parties and were not heard in the previous suit. He asserted that the 2nd to 14th petitioners being the children of the 1st petitioner were entitled under the kikuyu customary law to have an interest in their father's land. He contended they had been in occupation and were residing on the suit land and their interest therefore could not be ignored. He argued customary law rights had been expanded and contended that Article 19 of the Constitution indeed embodied cultural rights as a fundamental right and in this respect he submitted the petitioners cultural and customary rights were issues that were not considered in the previous suit and in the present matter ought to be given consideration and a determination made.

11. Dr. Khaminwa asserted the 1st petitioner's children rights were infringed and they were entitled to join in this action under Article 22 of the Constitution which gives every person a right to approach the court for redress whenever their rights are infringed or threatened with infringement. In the same vein Dr. Khaminwa submitted that the 1st petitioner as a Senior Citizen under Article 57 of the constitution

deserved to have his rights and those of his family safeguarded and protected.

23. Dr. Khaminwa further submitted that this court was not bound by the judgment of Ojwang, J as that Court did not deal with Constitutional issues and urged this court to apply the Bill of Rights and quash the judgment as being unconstitutional. He argued the 1st petitioner was allocated 66 acres of land and he was not consulted when the acreage was reduced. He stated the 1st petitioner was denied any hearing and hence the principle of fair administrative action as embodied in Article 47 of the constitution was not observed and that rendered the action taken an illegality and a nullity. He observed that even though the judgment was prior to the promulgation of the 2010 constitution, the petitioners continued in possession and stated the Bill of Rights under the constitution would in the premises be applicable.

24. Njugi advocate in brief submissions echoed the submission of the lead counsel, Dr. Khaminwa. He however submitted as this matter was anchored on the Bill of Rights and Fundamental Freedoms, the doctrine of Res judicata was inapplicable and therefore the Court was seized of jurisdiction to determine the same since it was a constitutional petition.

Submission of the 1st Respondent

25. Mr. Kamau advocate on behalf of the 1st Respondent submitted that the issues raised in the petition related to land dispute between the 1st petitioner and the 1st respondent (deceased) which had been the subject of litigation in at least 5 other suits.

26. He submitted the matter was clearly res judicata as the issues raised had been determined in the previous cases. He submitted Ojwang, J in HCCC No. 395 of 1997 aptly dealt with the issues raised in the petition and that this court cannot sit on appeal against the judgment of Ojwang, J as he was presiding a court with concurrent jurisdiction with this court.

27. Mr. Kamau submitted that the possession and occupation claimed by the petitioners was achieved by use of force when the petitioner forced entry onto the land and he argued such possession and occupation could not lawfully pass any proprietary interest over the disputed suit land. Mr. Kamau further submitted that res judicata was not part of procedural law but constituted substantive law in regard whereof the petitioners could not invoke Article 159 (2) (d) of the constitution to defeat the application of the doctrine.

28. In regard to the submission that the 2nd to 14th Petitioners were not parties in the previous suit, the 1st Respondent submitted that their claim is through the 1st petitioner who is their father and that he represented the interest of the family in the litigation. Besides the 1st respondent asserted the 2nd to 14th defendants had no legal proprietary interest in the suit property and were content to have their father fight it out with the 1st respondent. They had the opportunity to apply to be enjoined in the earlier suit but did not take it up though they were aware of the ongoing litigation.

Analysis and determination

29. The dispute between the 1st petitioner and the 1st respondent has been alive since 1985 and has been the subject of various suits. The suits have all touched and concerned land parcels Nyandarua/South Kinangop/430 registered in the name of the 1st petitioner and Nyandarua /South Kinangop 1431 registered in the name of the 1st respondent Ikere Gitau (now deceased). The gist of the dispute was whether the 1st petitioner's land parcel ought to have been 12.6 Ha (31.12acres) in respect of which he was registered or should have been 66 acres which he claimed to have been allocated in 1963 and which he had occupied. The 1st petitioner's position was that the land allocated to the 1st respondent formed part of the land that he had been allocated. The issue whether the 1st petitioner had encroached and therefore a trespasser onto the 1st Respondent's land parcel Nyandarua/South Kinangop/431 came into sharp focus in Nairobi HCCC No. 395 of 1997 where the court among other issues considered the allocation, occupation, size and use of the two parcels of land. The court vide its judgment delivered on 14th July 2010 found the 1st petitioner to have encroached and trespassed onto the 1st Respondent's land parcel and ordered his eviction therefrom.

30. The court in its judgment observed that both the 1st petitioner who was the defendant in the suit, and the 1st respondent who was the plaintiff in the suit, had each made an application to the Settlement Fund Trustees (SFT) to be allocated land. That although the SFT did not make any declaration how much land was to be allocated, the 1st petitioner had it in his mind that he would get 66 acres such that when he got the allocation he assumed he was given 66 acres. The allocations were made before survey was done and the sizes of the allocated land became evident when survey was done and titles registered. In answer to questions the court had posed in the judgment, the judge at page 36-38 of the judgment (HCCC No.395 of 1997) stated thus: -

“The answer to these questions come through evidence which this court found to be truthful. Firstly, the plaintiff, at his parcel of land is a neighbor to the defendant at the defendant's parcel of land. Secondly, it is not doubted that the defendant, who previously had been an employee of foreign settlers, was physically in the area that is the locus in quo before the plaintiff came along. Thirdly, both the defendant and the plaintiff had sought land allocation from the Settlement Fund Trustees. Fourthly, although the Settlement Fund Trustees did not declare how much land the applicants would be given, the defendant's mind had it that he was to get 66 acres, and so, the day he got his allocation, he assumed he had been given that acreage. Fifthly, even the plaintiff did not know how much land was being availed to him but when later he received his title deed he found out that his land comprised 14.2 Ha.

Since the defendant's belief was that his land measured 66 acres, he all along assumed that the plaintiff had stolen; but he failed, and realized that the law was on the plaintiff's side.

Now it was the plaintiff's evidence that the defendant resorted to forcible entry in 1991, and that the defendant and his family and supporters, invaded the plaintiff's land, evicted the plaintiff from most of this land, and installed themselves on the plaintiff's land.

The defendant's preference for the extra-legal solution is further evident in his testimony about a Minister's visit to the locus in quo, on 24th April 1991; the Minister declared that most of the land was the defendant's; the Minister out of humane inclination, allowed the plaintiff to keep only ten acres of land; and for the defendant's loss of the said ten acres the Minister directed that he be compensated by an award of similar portion, in a different settlement scheme and it was done. So this political gesture in the defendant's perception, concluded the dispute, and the plaintiff's sole lawful possession was the ten acres of land and accordingly the plaintiff ought to be nonsuited.

The defendant's position is wrong in law; for title to land under the Registered Land Act (Cap 300, Laws of Kenya), is conferred not by political declarations, but by the instrumentality of registration in the institutional set-up of the land Registry. It follows that this Court will only recognize the title, L.R No. Nyandarua/South Kinangop/431 as the land of the plaintiff, in respect of which he has full proprietary rights, as provided for in section 75 of the constitution of Kenya. Of course, the defendant has similar rights in respect of L.R No. Nyandarua/South Kinangop/430."

31. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya anchors the Res judicata principle and it provides as follows:-

7. Res judicata

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.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

32. Having regard to the above provision, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties or parties under whom they or any of them claim, litigating under the same title, and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see **Karia & Another -vs- The Attorney General & other (2005) 1 EA 83**).

33. The application and essence of the doctrine of Res Judicata was succinctly espoused in the English case of **Henderson -vs- Henderson (1843) 67 ER** which has been cited with approval and followed by the Courts in this country. In the case **Wigram V-C** stated as follows: -

“ -- where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstance permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence, or even accident, omitted part of their case, The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but on every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”. (emphasis added).

34. The petitioners have in their submissions argued that the doctrine of res judicata has no application to constitutional petitions as it would amount to disposing of the matter on procedural technicalities contrary to the edict provided under Article 159 (2) (d) of the constitution. The doctrine of res judicata is a doctrine of general application and where it is successfully ventilated it has the effect of barring any further proceedings in the matter. It cannot fall under the realm of mere technicality. I am fortified in this position by the holding of the Court of appeal in the case of **John Florence Maritime Services Ltd & another -vs- CS for Transport & Infrastructure & 3 others (2015) eKLR** where the court stated as follows:-

“We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should be barred from the Citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the Court to

entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such a result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit”

35. Our supreme Court in the case of *Kenya Commercial Bank Ltd -vs- Muiri Coffee Estates Ltd & Another (2016) eKLR* has added its voice as to the efficacy of res judicata and its application in Constitutional matters. At paragraphs 54 and 55 of the judgment, their Lordships stated thus: -

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the Cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy on the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; it ensures the litigation comes to an end, and the verdict duly translates into fruits for ne party, and liability for another party, conclusively,

55. It emerges that contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope of substantial justice, the relevance of res judicata is not affected by the substantial justice principle of Article 159 of the Constitution, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of substantive legal concept”

36. Whether or not a subsequent matter is res judicata is dependent on whether the ingredients necessary to constitute a matter as being res judicata are satisfied. The test predominantly is whether the earlier suit raised the same issues as are being raised in the current suit; whether the parties were the same and ultimately whether a final decision on the issues was rendered by the earlier suit. The Supreme Court in the case of *Kenya Commercial Bank Ltd -vs- Muiri Cofffee Estate Ltd & another* (supra) under paragraph 58 of their judgment provided guidance on how to determine whether a matter is res judicata as follows:-

“(58) Hence, whenever the question of res judicata is raised a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction”.

37. I have carefully studied the judgment rendered by Ojwang, J in HCCC No. 395 of 1997. The judgment has set out the evidence adduced at the trial in considerable detail. The plaintiff (1st respondent herein) and the defendant (1st petitioner) herein submitted separate issues for determination before that court. The issues were as hereunder: -

For the plaintiff (1st respondent)

1. Is the plaintiff the registered and lawful owner of LR. Nyandarua/South Kinangop/431?
2. Is there any justification for the defendant’s continued occupation of L.R No. Nyandarua/South Kinangop/431?
3. Does the defendant’s said occupation of the suit property constitute trespass and is the plaintiff entitled to evict him therefrom?
4. If the answer to No.3 is in the affirmative, has the plaintiff suffered any loss and damage and if yes, what is the quantum of such damages?
5. What is the appropriate order as to costs?

For the defendant (1st petitioner)

- i. Was the allotment of the suit land to the plaintiff lawfully done?
- ii. Was the acquisition by the plaintiff of land originally allotted to the defendant/fraudulent?
- iii. Does the defendant’s occupation of the suit land amount to trespass?
- iv. What is the appropriate relief in this suit?
- v. What is the appropriate order as to costs?

38. On the evidence analyzed by the court it is evident that the court considered all the issues as framed by the parties. This included consideration of the allotment, plot sizes and whether there was an error/mistake made by the SFT. The court evaluated the documents which the petitioners have exhibited in support of the petition and ultimately reached the decision that it did. In the present petition I am satisfied, the court is being called upon to consider and determine the same issues that were considered and determined by the court earlier. The issues revolve around the allotment and occupation of the two respective parcels of land Nyandarua/South Kinangop/430 and 431. The Court in the earlier suit exhaustively considered the issue of allotment and occupation of the parcels of land including whether the 1st petitioner was

allocated 66 acres and not 12.6 Hectares as depicted on his title. The court was emphatic that there was no evidence that the 1st petitioner was allocated 66 acres and held that he was in trespasser on the 1st Respondent's land. Parcel Nyandarua/South Kinangop/431 and ordered his eviction.

39. The 1st petitioner may not have agreed with the judgment but he then had the option to appeal against the judgment to the Court of Appeal. He did not appeal but instead sought a review of the judgment. The application for review was dismissed by the Court which meant the judgment rendered on 14th July 2010 stood. This court cannot sit on appeal against the judgment of Ojwangi J, as the Court he presided over had concurrent jurisdiction with this Court. I am conscious that the petitioners have sought a declaration that this court finds the judgment in Nairobi HCCC No.395 of 1997 to have been in violation of the petitioner's fundamental rights and to quash the same for being unconstitutional. I doubt even if I was to agree the judgment violated the constitution, (which I however do not agree) that I would be in a position to quash it. The judgment was by a competent Court of concurrent jurisdiction and its decision cannot be subjugated to this court so that I could have supervisory authority. The judgment constituted a final decision on the issues it dealt with and could only be varied or set aside on review and/or on appeal to a higher court.

40. As I have held the issues raised in the earlier case were similar and/or are substantially similar to the issues raised in the present petition, though the issues in the petition are presented as constitutional issues (which I am not satisfied they are), the only other issue to determine is whether the parties were the same. In the earlier suit the 1st petitioner was the defendant and he had been sued by the 1st respondent (deceased) since he was the owner of the adjacent LR No.Nyandarua/South Kinangop/430 and according to the 1st respondent the 1st petitioner allegedly forcibly in 1991 entered and occupied a large portion of the 1st respondent's land claiming it formed part of his (1st petitioner's) of his land parcel 430. The 2nd to 14th Petitioners were not parties in the earlier suit but they are the children of the 1st petitioner and their claim and interest (if any) would be restricted to land parcel Nyandarua/South Kinangop/430 which was owned by their father the 1st petitioner. All the petitioners claims in my view flow from the 1st petitioner's claim of land parcel Nyandarua/South Kinangop/430 and that the 2nd to 14th petitioners did not each have an independent and separate claim which could stand on its own. The 2nd to 14th petitioners are all claiming under the 1st petitioner as without him no one else could have a sustainable claim in regard to the suit property. Consequently, the 1st petitioner represented the interest of his children when he litigated in the earlier suit. The customary claims agitated by the petitioners in this petition would only have application to land parcel Nyandarua /South Kinangop/430 which belonged to the 1st petitioner and still does.

41. I see the enjoinder of the 2nd to 14th Petitioners as an attempt to wade off the application of the Res judicata principle by introducing new parties when essentially the claim remains the same. The enjoinder of the Attorney General and the Commissioner of Lands as the 2nd and 3rd Respondents does not change the position. The commissioner of Lands was brought to stand in place of the Ministry of Lands and settlement while the Attorney General was the titular legal advisor of the Government and its departments. The nature of the suit would be the same and the evidence would be similar to the evidence adduced in the earlier suit.

42. The supreme court in the case of **Commercial Bank Ltd –vs- Muiri Coffee Estate Ltd & another** (supra) cautioned that courts have to be vigilant while dealing with matters where the res judicata principle is invoked. The court citing with approval the case of **ET –vs- Attorney General & Another (2012) eKLR** stated.

“(59) That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in **E.T -vs- Attorney General & Another 92012) eKLR** 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 new cause of action which has been resolved by a Court of competent jurisdiction. In the case of **Omondi -vs- National Bank of Kenya Ltd and others (2001) EA 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; in the case of **Njangu -vs- Wambugu and Another Nairobi HCCC no. 2340 of 1991** (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 of court, then I do not see the use of the doctrine of res judicata---“

43. The paragraph cited by the supreme court sums up my earlier observations that the 1st petitioner sought to find an ingenious way of having a second bite at the cherry but once the veil is cast aside it is the same case that was decided by Ojwang, J in 2010 that remains. The contestants are the 1st petitioner and the 1st respondent (deceased) and the issue remains the same. The petition is without doubt res judicata.

44. Having come to the conclusion that the instant suit is res judicata there is no need to consider the other issues raised in the petition as it would simply be an exercise in futility. I have no jurisdiction to make any further orders as by holding the petition is res judicata, I have divested myself of jurisdiction to proceed further and I ought not to proceed any further.

45. The net result is that the petition is ordered dismissed. Any conservatory orders that may have been granted are vacated. The costs of the petition are awarded to the 1st respondent.

46. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF MARCH 2021.

J M MUTUNGI

JUDGE