



**Ndambo (Suing for and on Behalf of the Estate of Ndambo Ngungu – Deceased) v Gitau (Sued for and on Behalf of the Estate of Bernard Gitau Ngungu – Deceased); Gitau & 2 others (Interested Parties) (Environment & Land Case 77 of 2018) [2024] KEELC 5384 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5384 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 77 OF 2018**

**LN GACHERU, J  
JULY 11, 2024**

**BETWEEN**

**BERNARD GITAU NDAMBO ..... PLAINTIFF  
SUING FOR AND ON BEHALF OF THE ESTATE OF NDAMBO NGUNGU –  
DECEASED**

**AND**

**JOHN KIBANDI GITAU (SUED FOR AND ON BEHALF OF THE ESTATE OF  
BERNARD GITAU NGUNGU – DECEASED) ..... DEFENDANT**

**AND**

**DAVID MANGI GITAU ..... INTERESTED PARTY  
DANIEL NDUNGU GITAU ..... INTERESTED PARTY  
ELIZABETH NJERI GITAU ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff/Respondent herein Bernard Gitau Ndambo, filed this suit on 1<sup>st</sup> October 2018, against the Defendant herein, John Kibandi Gitau, and sought for various orders.
2. Among the orders sought are;
  - a. A declaration that land parcel no Loc 17/ Iganjo/ 1841, is the legal property of the Plaintiff and his family, and the same be registered in the name of the Plaintiff;
  - b. The court to direct and authorize the Land Registrar, Muranga to effect the transfer of the said land in the name of the Plaintiff;



- c. Costs be borne by the Defendant and any other relief that the court might deem fit to grant.
3. On 11<sup>th</sup> October 2018, the Defendant, John Kibandi Gitau, allegedly appointed the Law Firm of Mwaniki Warima & Co Advocates, to act for him. Consequent to that appointment, the parties allegedly filed a consent, which consent allowed the Plaintiff's claim, with each party being ordered to bear his own costs. A Decree to that effect was issued on 8<sup>th</sup> November 2018.
  4. However, later the Defendant filed a Notice of Motion Application dated 31<sup>st</sup> January 2022, seeking to set aside the consent order of 11<sup>th</sup> October 2018, on allegation that he never instructed the said Law Firm to enter into such negotiations and enter into a consent with the Plaintiff.
  5. After inter- parties hearing of the said Application, this court on 26<sup>th</sup> January 2023, allowed the said Application and set aside the said consent order and the Decree issued on 8<sup>th</sup> November 2018. Consequently, the case was supposed to proceed for inter- parties hearing and be decided on merit.
  6. Before the matter could be set down for hearing, the Interested Parties herein, who are related to the parties herein applied to be joined in the proceedings. The court allowed their application for joinder in the suit as Interested Parties.
  7. The Defendant filed a Statement of Defence on 14<sup>th</sup> February 2023, and denied all the allegations made in the Plaint. He alleged that the suit is *res judicata*, and urged the court to dismiss the entire suit, with costs to be borne by the Plaintiff/ Respondent.
  8. Further, the Defendant filed a Notice of Preliminary Objection dated 13<sup>th</sup> February 2023, and sought for the suit to be struck out with costs on the following grounds:
    - a. That this Court has no jurisdiction to entertain and determine this suit.
    - b. That this suit is *res judicata* and offends the provisions of Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya.
    - c. That the issues in this suit were directly and substantively in issue in the then Murang'a Senior Principal Magistrate Court Case No. 534 of 1995, between Bernard Gitau Ngungu (deceased), the Defendant's late father, and Ndambo Ngungu (deceased), the Plaintiff's late father and the same were heard and determined vide a Judgment of the Court delivered on 17<sup>th</sup> June, 1997.
  9. The Defendant also filed a Notice of Motion Application dated 17<sup>th</sup> April, 2023, anchored on Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A, 7 and 8 of the [Civil Procedure Act](#), and sought for the following orders:
    - a. That this Court has no jurisdiction to entertain and determine this suit.
    - b. That this suit be struck out and/or dismissed for being *res judicata*.
    - c. That the costs of the suit and the application be borne by the Plaintiff/Respondent.
  10. This Application dated 17<sup>th</sup> April, 2023, is premised on the grounds stated thereon and on the Supporting Affidavit of the Applicant, John Kibandi Gitau, sworn on even date. The Defendant/ Applicant averred that the present suit is *res judicata* as it raises issues which were heard and determined in Murang'a Senior Principal Magistrate Court Case No. 534 of 1995.
  11. The Court directed that the Notice of Preliminary Objection and the Notice of Motion Application be canvassed together through written submissions. The parties complied, wherein the Plaintiff/ Respondent and the Interested Parties filed their respective written submissions. However, the



Defendant/ Applicant did not file the written submissions. The court will rely on his pleadings and annexures thereto.

12. In his Supporting Affidavit, the Defendant/ Applicant averred that the parties in Case No. 534 of 1995 (Murang'a SPM Court), were two step-brothers namely, Bernard Gitau Ngungu, the Applicant's father as the Plaintiff, while the Respondent's father, Ndambo Ngungu, being the elder of the two, was the Defendant.
13. In the said suit, the Defendant/ Applicant's father laid a claim to half of land parcel No. Loc.17/ Iganjo/1841 (the suit property), on the basis that the same was family land, and was registered in the name of his elder brother (the Respondent's father), to hold it in trust for himself and the Defendant/ Applicant's father in equal share.
14. The entire acreage of the suit property then was initially 50 Acres. The Defendant/Applicant annexed the Plaintiff marked as "JKG2" and Judgment "JKG3(a)" delivered on 17<sup>th</sup> June, 1997, in the said Case No. 534 of 1995 (Murang'a SPM Court), which he asserted was in favor of his father. That the trial Court ordered the Respondent's father to surrender 25 Acres, of land from the suit property to the Applicant's father.
15. It was the Defendant/ Applicant further averments that according to the proceedings in Case No. 534 of 1995 (Murang'a SPM Court), which were annexed and marked as "JKG4", it emerged that the Respondent's father had sold 40 Acres of the suit property. That due to the disposal of 40 Acres, from the suit land by the Respondent's father, only 10 Acres were remaining at the time of the Judgment dated 17<sup>th</sup> June, 1997.
16. Further, that the Defendant/ Applicant's father assumed ownership over the remainder 10 Acres, and the Plaintiff/Respondent's father lost all claim over any portion of the suit property.
17. It was his further allegations that the Respondent's father being dissatisfied with the said decision, filed an Appeal against the said decision before the High Court at Nyeri in HCCA No.59B of 1998. However, the Respondent's father died on 25<sup>th</sup> February, 1999, while the said Appeal was pending determination whereupon the deceased was substituted in the suit by his wife Esther Wanjiku Ndambo, who is mother to the Respondent.
18. Further, that the Respondent's mother abandoned the Appeal being case no. HCCA No.59B of 1998, which resulted in the suit property being registered in the name of his father, pursuant to the Judgment dated 17<sup>th</sup> June, 1997, in Case No. 534 of 1995 (Murang'a SPM Court).
19. He contended that the orders issued in the said Judgment of the Court have never been challenged and/ or set aside. The said orders are still in force to date following the abandonment of Appeal No. HCCA No.59B of 1998 (Nyeri High Court). by the Respondent's mother.
20. The Applicant alleged that the present suit is motivated by deceit as the Plaintiff falsely claims that the Defendant's father became the registered proprietor of the suit property through fraud, whereas it is the Court that granted his father ownership of the suit land through its decision rendered on 17<sup>th</sup> June, 1997 in Case No. 534 of 1995.
21. The Applicant's further averred that the parties in the current suit are the successors in title to the parties in Case No. 534 of 1995 (Murang'a SPM Court), and the subject-matter of the former suit and the present suit is the same, thereby rendering the current suit *res judicata*.
22. Further, he averred that the Plaintiff/ Respondent is guilty of non-disclosure to this Court of the proceedings and Judgment in Case No. 534 of 1995 (Murang'a SPM Court), as well as the abandoned



- Appeal No. HCCA No.59B of 1998 (Nyeri High Court), which conclusively settled the question of the ownership of the suit property. He urged the Court to dismiss the suit and/or strike it out for non-disclosure of material facts.
23. The Defendant/ Applicant relied on the provisions of Sections 7 and 8 of the Civil Procedure Act, to support his Application and argument that the Plaintiff/Respondent should be stopped by the Court from instituting any further suit in respect of the suit land.
  24. The Plaintiff/ Respondent opposed the Application vide his Replying Affidavit dated 9<sup>th</sup> May, 2024, and averred that since the delivery of the Judgment in Case No. 534 of 1995 (Murang'a SPM Court), which is about 27 years ago, the Defendant/ Applicant has not transferred any portion of the suit land to himself. He admitted that his father sold 30 Acres, out of the suit property to several purchasers four (4) of whom failed to transfer the portions sold to them into their names.
  25. The Plaintiff/ Respondent relied on the provisions of Section 4(4) of the Limitation of Actions Act, to anchor his argument that since the Defendant/ Applicant has been sleeping on the Decree in Case No. 534 of 1995 (Murang'a SPM Court) for 27 years, the same defeats the principle of *res judicata*.
  26. The Application was canvassed by way of written submissions. The Plaintiff/ Respondent filed written submissions on 9<sup>th</sup> May, 2024, through the Law Firm of Chege Kibathi & Co Advocates. It was his submissions that the Judgment in Case No. 534 of 1995 (Murang'a SPM Court), has since lapsed pursuant to the provisions of Section 4(4) of the Limitation of Actions Act.
  27. Reliance was placed in the decision in the case of Topisis & 4 others (ELC Appeal E002 of 2022) [2023] KEELC 21129 (KLR); and, M'Ikiara M'Rinkanya & Another v Gilbert Kabere M'mbijiwe Civil Appeal No. 124 of 2003 [2007] eKLR. Where the court held as follows:

" the purpose of the above section is to eradicate stale claims and stop the vexing of litigants. where a judgement creditor elects to sleep on a decree, he is estopped from waking up from his slumber after 12 years have lapsed to claim his right. The law bars such claims."
  28. The Plaintiff/ Respondent also submitted that his suit is not *res judicata*, as the Defendant's father slept on his right to execute the decree within 12 years, and therefore, this court has jurisdiction to entertain and determine the suit. Further that the title in whose name the suit property is registered is that of Ndambo Ngungu, the Plaintiff's father as evidenced in the copy of the title to the suit land annexed to the Plaintiff's Application dated 27<sup>th</sup> February 2020.
  29. The Interested Parties also filed their written submissions on 9<sup>th</sup> May, 2024, and submitted that the Plaintiff/Respondent is intent in denying them and the Defendant/ Applicant their lawful entitlement to their respective portions of the suit property as determined by the Court in Case No. 534 of 1995 (Murang'a SPM Court) after a full trial.
  30. They further submitted that the gravamen of the suit herein concerns the ownership of the suit land, which question was conclusively resolved by the Court in the above case. Therefore, this court lacks jurisdiction to entertain the Plaintiff's suit because the Plaintiff has not demonstrated that he holds a grant of letters of administration ad litem in respect of the estate of Esther Wanjiku Ndambo.
  31. Further, it was their submissions that the Plaintiff lacks *locus standi* to commence the suit, as he does not have letters of Administration. It was also submitted that the Plaintiff deliberately concealed from this Court the existence of Case No. 534 of 1995 (Murang'a SPM Court) and HCCA No.59B of 1998 (Nyeri High Court).



32. The Interested Parties argued that the Plaintiff's suit is *res judicata* pursuant to the reasoning of the Court in the case on *IEBC v Maina Kiai & 5 others*, Nairobi CA No.105 of 2017 (2017) eKLR; *Gitau v Gitau & 2 Others* (ELC Case No. 15 of 2021 [2023] [ KEELC 16029 (KLR), where the Court of Appeal held that for a bar of *res judicata* to be effectively raised and upheld on account of former suit, the following elements, must be satisfied;
- a. The suit or issue was directly and substantially in issue in the former suit,
  - b. The 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 and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
33. On the issue of costs, they relied on the holding in the case on *IEBC v Maina Kiai & 5 others*, Nairobi CA No.105 of 2017 (2017) eKLR and *Republic v Rosemary Wairimuy Munene (Ex parte Applicant) v Ihururu dairy Framers Cooperative Society Ltd* JR Appl. No. 6 of 2004, to support their submissions that the Plaintiff should bear the costs of the suit.
34. As stated earlier, the Defendant/Applicant did not file the written submissions, as directed by the court. He filed an Application dated 5<sup>th</sup> July 2024, to arrest the delivery of this Ruling, but it was too late in the day. The court had started the preparation of this Ruling and therefore did not arrest it.
35. Having considered the Notice of Preliminary Objection dated 13<sup>th</sup> February 2023, the Notice of Motion Application dated 17<sup>th</sup> April 2023, the annexures thereto, the written submissions and the relevant provisions of law, the court finds the issues for determination are;
- i. Whether the Defendant/Applicant is entitled to the Orders sought in both the Preliminary objection and Notice of Motion?
  - ii. Who shall bear the costs of the suit?
36. A Preliminary Objection was described in the case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd* (1969) EA 696 as follows: -

" .....So far as I am aware, 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".

.....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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."



37. Further, in the case of *Oraro –vs – Mbaja* (2005) 1 KLR 141, the court held that:
- “Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
38. In the case of *Henry Wanyama Khaemba...vs...Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held that:
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of *res judicata*, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.
39. Further in the case of *George Kamau Kimani & 4 Others...vs...County Government of Trans Nzoia & Another* (2014) eKLR, Court held that:
- “I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of *res judicata* by way of Preliminary Objection. The best way to raise a ground of *res judicata* is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. Professor Sifuna did not raise the issue of *res judicata* by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.
40. Bearing in mind the above decisions of the court, and the instant Preliminary Objection which is hinged on the issue of *res judicata*, which is anchored under Section 7 of the *Civil Procedure Act*, 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.”
41. This court finds that the same ought to have been filed as a Notice of Motion application, since facts have to be ascertained, by looking at the proceedings and determination of the former suit. In any event, the Defendant/ Applicant later filed a Notice of Motion Application still on the same issue of *res judicata*.
42. Given that the Defendant has filed an Application that the suit be struck out for being *res judicata*, the court, will abandon making any findings in this Preliminary Objection, but proceeds to determine the Notice of Motion Application dated 17<sup>th</sup> April 2023.



43. In the case of *Henderson vs Henderson* (1843) 67 ER 313, *res judicata* was described 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 circumstances) permit the same parties to open the same subject of litigations in respect of a 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, inadvertence or even accident omitted part of their case. The pleas 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 to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.
44. The Court has perused and analyzed the pleadings and rival written submissions of the parties, the Court is alive to the fact that this dispute between the parties herein was subject to Court-Annexed mediation proceedings which ultimately proved unsuccessful to settle the matter.
45. In the case of *IEBC vs Maina Kiai* (*supra*), the Court of Appeal held as follows;
- “ the rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as 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 for a, to obtain at last, outcome favorable to them.”
46. The above being the essence of the doctrine of *res judicata*, this court finds that it is evident that the suit property has been a subject of several court proceedings, involving some of the parties herein. All the parties herein are related and they share a common grandfather, who was the initial owner of the suit property Loc 17/ Iganjo/ 1841.
47. The Interested Parties submitted that the Plaintiff/Respondent lacked *locus standi* to lodge the suit, as he did not have Letters of Administration in respect of the estate of Esther Ndambo, who was the administrator of the estate of Ndambo Ngungu(deceased).
48. The Court has perused a grant of letters of Administration intestate issued in favour of the Plaintiff/ Respondent in respect of the state of Bernard Gitau alias Bernard Gitau Ngungu. The Court is satisfied that the Plaintiff/Respondent has the requisite authority to file the suit on behalf of the estate of the deceased, Ndambo Ngungu.
49. On the question of the issue of *res judicata*, the Court is satisfied that the issue of ownership of the suit land herein being Loc 17/Iganjo/ 1841, was an issue that was the subject of the pronouncement of the Court in its Judgement in the Case No. 534 of 1995 (Murang’a SPM Court).
50. No Judgment was presented to this Court in respect of HCCA No.59B of 1998 (Nyeri High Court), lodged by the Plaintiff/Respondent’s successor in title. Without evidence of the outcome of the Appeal, it is the finding and holding of this Court that the Judgment of the Court issued on 17<sup>th</sup> June, 1997, in Case No. 534 of 1995 (Murang’a SPM Court), was not set aside and/or vacated; Therefore, the said Judgement still stands.



51. Having found that the Judgement of the court delivered on 17<sup>th</sup> June 1997, was not set aside and it still stands, this court finds and holds that the said judgement settled the issue of ownership of the suit land.
52. The Plaintiff/ Respondent has alleged that the said Judgement is over 27 years, and cannot be enforced. However, the Defendant/ Applicant has not sought to enforce the said Judgement of 17<sup>th</sup> June 1997. The Plaintiff is the one who filed a new suit, while knowing very well that the issue of ownership of the suit land was settled on 17<sup>th</sup> June 1997.
53. Having found that the Application herein is not for enforcement of the Judgement of 17<sup>th</sup> June 1997, this court finds and holds that the suit herein is not barred by the provisions of section 4(4) of the *Limitation of Actions Act*.
54. The issue of ownership of the suit land Loc 17/ Iganjo/ 1841, was determined in Muranga SPMCC No. 543 of 1995. This instant suit being a new suit over the same suit property, which issue was determined by court of competent jurisdiction, then this court finds and holds that this suit is *res judicata*.
55. The upshot of the foregoing is that the instant Notice of Motion Application dated 17<sup>th</sup> April, 2023, is found merited and consequently, this Notice of Motion is allowed entirely in terms of prayer No. 1, as the court has no jurisdiction to hear a matter that is *res judicata*.
56. Having found that the suit is *res judicata*, the court further finds and holds that the suit cannot stand, and consequently, the suit is struck out/ and or dismissed for being *res judicata*. Prayer No 2 of the instant Notice of Motion Application is also allowed.
57. The Plaintiff/ Respondent filed a suit while knowing very well that the issue in question was conclusively determined in Muranga SPMCC No. 534 of 1995. For the above reasons, the Plaintiff/ Respondent is condemned to pay costs of this suit and the Application herein
58. In a nutshell, the Defendant/ Applicant's Notice of Motion Application dated 17<sup>th</sup> April 2023, is allowed entirely in terms of prayers No. 1, 2 and 3.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 11<sup>TH</sup> DAY OF JULY, 2024.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mr. Kiptoo h/b for Mr Juma for Plaintiff/ Respondent.

Mr. T.M. Kariuki for the Defendant/ Applicant

1<sup>st</sup> Interested Party – Present in person

2<sup>nd</sup> Interested Party – Present in person

