



REPUBLIC OF KENYA



Mareka & another v Gimu Development Company (K) Limited & 4 others (Environment & Land Case E004 of 2023) [2024] KEELC 7413 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E004 OF 2023
A NYUKURI, J
NOVEMBER 6, 2024**

BETWEEN

MIRIAM LOUISE MAREKA 1ST PLAINTIFF

GERALD GACHERU WAMBUGU 2ND PLAINTIFF

AND

GIMU DEVELOPMENT COMPANY (K) LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD DEFENDANT

LAND REGISTRAR, MACHAKOS DISTRICT 4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion dated 11th August 2023 filed by the 3rd defendant seeking the following orders;
 - a. That this Honourable Court be pleased to strike out the plaintiffs' suit for being res judicata pursuant to Section 7 of the [Civil Procedure Act](#).
 - b. That the plaintiffs' plaint dated 14th December 2022 be struck out.
2. The application was anchored on the supporting affidavit of Jessica Mbae the 3rd defendant's Assistant Director, Legal Services, sworn on 11th August 2023. The applicant's case is that in view of the judgment in Machakos ELC Petition No. 8 of 2021; Miriam Louise Mareka and Gerald Gacheru



Wambugu v. National Land Commission, National Highways Authority and the Honourable Attorney General (former suit) this suit is res judicata.

3. She further deponed that the claim herein on the amount owed to the plaintiffs pursuant to the World Bank Operational Policy on Involuntary Settlement was heard to finality in the former suit. She stated that the parties herein and those in the former suit are similar; both suits are on a claim for compensation to the plaintiff for involuntary settlement in respect of construction of the second carriage way of Athi River – Machakos Turn Off Road (A109) Project near the suit properties and that the suit properties in both suits are Mavoko Town Block 64 (Gimu)/508, 509 and 510 (suit property).
4. She maintained that no appeal or review was preferred against the court’s decision in the former suit. That in the current suit, the plaintiff now intends to produce more evidence than the one produced in the former suit. She attached a copy of the judgment in Machakos ELC Petition No. 8 of 2021.
5. The application was opposed. Miriam Louise Mareka, the 1st plaintiff swore a replying affidavit dated 9th November 2023. She stated that this suit is not res judicata and that they withdrew the prayer for permanent injunction against the 3rd defendant herein, who was the 2nd respondent in the petition.
6. She maintained that it was clear that in the petition, they sought compensation for their affected properties, being the suit properties herein based on the provisions of Gazette Notice No. 9536 of 29th September 2017 and the awards dated 23rd January 2018 made to them by the 2nd defendant herein. She stated that further, their petition sought to find that Gazette Notice No. 1919 of 6th March 2020 as null and void and to delete the suit properties from the list of properties to be compulsorily acquired.
7. Contrasting the petition in the former suit with the plaint herein, she stated that the plaint herein seeks orders that the defendants compensates them in respect of the suit property based on World Bank Operational Policy on Involuntary Settlement and NOT Gazette Notice No. 9536 of 29th September 2017, which was the subject of the petition. She insisted that the issue of compensation under the World Bank Policy was not part of Petition No. 8 of 2021 and therefore has not been litigated upon, so as to make it res judicata. That the claim in the former suit sought compensation based on Gazette Notice No. 9536 of 29th September 2019 and awards dated 23rd January 2018, whereas the current suit seeks compensation under the World Bank Operational Policy on Involuntary Settlement which are Totally unrelated. She further stated that the plaintiffs herein have filed an appeal in the Court of Appeal against the judgment in the former suit, and attached a Memorandum of Appeal.
8. She stated that it was not true that the court had in the petition decided their claim pursuant to the World Bank Operational Policy on Involuntary Settlement and termed as obiter dictum the findings of the court in paragraph 61 of the judgment in the former suit, arguing that the court merely noted that the award given to them was not under the ambit of compulsory acquisition but under the World Bank Operational Policy on Involuntary Settlement. She maintained that in the former suit, they never sought for compensation under the World Bank Operational Policy on Involuntary Settlement and that therefore the court could not render a decision on what was not pleaded by the parties.
9. The application was canvassed by way of written submissions. The 3rd defendant filed submissions dated 4th December 2023; the plaintiffs filed submissions dated 9th November 2023 and the 5th defendant filed their submissions dated 14th November 2023.

3rd defendant’s submissions

10. Counsel for the 3rd defendant submitted that the plaintiffs herein filed Machakos ELC Petition No. 8 of 2021 against the 2nd, 3rd and 5th defendants herein, which suit was determined and the court held that the petitioners’ claim was pursuant to the World Bank Operational Policy on Involuntary Settlement



and since no evidence was rendered to show that the same was inadequate, there was no basis for the court's interference with the award. Counsel argued that in the current suit, the plaintiffs sought compensation under the World Bank Operational Policy on Involuntary Settlement, an issue that had been determined in the previous suit.

11. Counsel relied on Section 7 of the *Civil Procedure Act* and the decision in the case of *Kenndy Mokuvi Ongiri v. John Nyasendi Mosioma & ORS* [2022] eKLR and submitted that this court is Res Judicata as the issues herein and those in the previous suit are the same; the parties are the same and that the court that determined the previous suit had jurisdiction to determine the matter. Counsel argued that this court determined the issue of compensation under the World Bank Operational Policy on Involuntary Settlement and that it will amount to an injustice for the plaintiff to relitigate that issue.

Plaintiffs' submissions

12. Counsel for the plaintiffs submitted that the doctrine of res judicata is founded on public policy aimed at ensuring finality to litigation and an individual should not be harassed twice. Counsel cited the case of *Nicholas Njeru v. The Attorney General & 8 Others* [2013] eKLR and argued that the 3rd defendant's application did not meet the threshold set out in Section 7 of the *Civil Procedure Act*.
13. It was further submitted for the plaintiffs that it was not disputed that the suit properties in the former suit and in the current suit are the same. They insisted that the point of departure is that in the previous suit, the petitioners sought compensation based on provisions of Gazette Notice No. 9536 of 29th September 2017 and awards dated 23rd January 2018, as well as annulment of Gazette Notice No. 1919 of 6th March 2020 seeking deletion of the suit properties from the list of properties to be compulsorily acquired by the 2nd defendant; while in the instant suit, the plaintiffs sought compensation based on the World Bank Operational Policy on Involuntary Settlement. Counsel submitted that the above are distinct issues. Counsel further argued that the question of compensation of affected persons under the World Bank Operational Policy on Involuntary Settlement was not part of the petition in the former suit and therefore has not been litigated to bring it under the ambit of Section 7 of the *Civil Procedure Act*.
14. Counsel also submitted that the parties in the former suit are different from those in the current suit. Concerning the court's findings vide paragraph 61 of the judgment in the previous suit, to the effect that the award made to the petitioners was not made under the ambit of compulsory acquisition but pursuant to the World Bank Operational Policy on Involuntary Settlement, and the court could not interfere with the award as there was no evidence of inadequacy of the award; the plaintiffs' counsel took the view that the same was merely obiter dictum and did not amount to the decision of the court as the question of compensation on the above World Bank Operation Policy was not substantively pleaded in the petition and hence not an issue for determination.
15. Regarding the decision in the former suit, counsel conceded that the same was by a competent court and determined on merit.

5th defendant's submissions

16. Counsel for the 5th defendant submitted that this suit is res judicata, incurably defective, frivolous and an abuse of the court process and offends Section 7 of the *Civil Procedure Act*. Counsel argued that the doctrine of res judicata is important in adjudication of cases and serves the purpose of preventing multiplicity of suits and to bar disappointed parties from camouflaging already decided cases in new garment in the art of pleadings.



17. Reliance was placed on the cases of Kennedy Mokuia Ongiri (Supra) E.T. v Attorney General & Another [2012] eKLR, Christopher Kenyariri v. Salama Beach [2017] eKLR and Grace Njeri Kabiru v. Stephen Wagiita Kiboi & 2 Others [2018] eKLR for the proposition that the parties and issues in this matter are the same as those in the previous suit and therefore this suit ought to be dismissed, for being res judicata.

Analysis and determination

18. The court has carefully considered the application, response thereto and the parties' rival submissions. The only issue that arise for determination is whether this suit is res judicata in view of the judgment delivered in Machakos ELC Petition No. 8 of 2021 on 25th May 2022.
19. The doctrine of res judicata bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit where a competent court has determined such matter or issue with finality.
20. Section 7 of the [Civil Procedure Act](#) 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.

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.

21. Therefore, the elements of res judicata are as follows;
- a. There is a judgment or order in a former suit which is final.
 - b. The judgment or order in the former suit was on merit.
 - c. The judgment or order was rendered by a competent court with jurisdiction.
 - d. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.



22. In the case of *The Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal held 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 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 heard and determined the issue was competent to try the subsequent suit or the issue in which the issue is raised.

23. In the above decision, the Court of Appeal went on to state the purpose of the doctrine of res judicata 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 spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and fora, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

24. A plea of res judicata bars the court from trying an issue or matter raised in a subsequent suit, which properly belonged to the subject matter in the former suit and ought, upon exercise of due diligence, to have been raised in the former suit, but which was not raised due to mistake, inadvertence or negligence of the parties. In the case of *Hinderson v. Henderson* [1843] 3 Hare 100 at page 115, cited with approval by the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015)* [2021] KESC 39 KLR (CIV) (6 August 2021) Judgment, it was held as follows;

Where a given matter becomes the subject of 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 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, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....



25. It is not disputed that the suit properties are the same both in the former suit and in the instant suit. To determine the question of *res judicata*, it is necessary to restate the parties' respective cases in the former suit and in the instant suit. In the former suit, the petitioners were Miriam Louise Mareka and Gerald Gacheru Wambugu who sued the National Land Commission, the National Highways Authority and the Honourable Attorney General seeking the following orders;
- a. A declaration do issue, declaring as null and void the Gazette Notice No. 1919 of 6th March 2020 deleting their parcels of lands acquired compulsorily whilst construction of the road on the said parcels of land is ongoing and copies of official search indicate that the area is intended to be acquired compulsorily for the project.
 - b. A declaration do issue that the Petitioners are entitled to compensation by the respondents as per the awards dated 23rd January 2018 and in accordance to Gazette Notice No. 9536 of 29th September 2017.
 - c. An order of permanent injunction do issue restraining the 2nd Respondent, whether through its servants, agents, employees, contractors or any other person acting on its behalf whether directly or indirectly to immediately and unconditionally cease all ongoing road construction works on Mavoko Town block 64 (Gimu)/508, Mavoko Town block 64 (Gimu)/509 and Mavoko Town block 64 (Gimu)/510 and cease from engaging in all construction related activities and processes in respect of the construction of second carriageway of Athi River-Machakos Turnoff (A109) road project which relate to the aforesaid lands without just, fair, prompt compensation and accurate awards.
 - d. A declaration do issue that partial acquisition of the petitioners parcels of land Mavoko Town block 64 (Gimu)/508, 509 & 510 will render the remaining land inadequate for its original intended use and will severely and disproportionately reduce the value of the remaining land therefore the 1st and 2nd Respondents should acquire the entire parcels in accordance to section 122 of the [Land Act](#) 2012.
 - e. That the court be pleased to issue any other or further orders and or directions as it may deem fair and just.
 - f. That the Respondents be condemned to pay costs of the application and petition.
26. The facts of the case according to the petitioners in the former suit were that they were the registered proprietors of the suit properties and that on 29th September 2017 vide Gazette Notice No. 9536, the National Land Commission informed the petitioners together with other persons affected by the project of its intention to acquire the listed parcels of land, which included the suit properties, on behalf of the Kenya National Highway Authority for the construction of second carriageway of Athi River – Machakos Turn Off Road (A109) Project in Machakos County. That inquires as per the provisions of the [Land Act](#) were duly conducted and letters of awards for compensation dated 23rd January 2018 issued to the petitioners who accepted the awards being Kshs. 53,009,200/- for the 1st petitioner and Kshs. 208,346,600/- for the 2nd petitioner respectively.
27. The petitioners further stated that vide a Gazette Notice No. 1919, of 6th March 2020 the National Land Commission notified the petitioners that their parcels had been deleted from the earlier Gazette Notice for compulsory acquisition, thereby nullifying their awards. That they were issued with new awards dated 6th January 2011 which the petitioners faulted for failing to take into account the size and value of the land and contended that the National Land Commission should acquire their entire parcels as partial acquisition would severely reduce the value of their remaining land.



28. In response to the petition, the National Highways Authority filed a reply to the petition and stated that the suit properties were subdivisions of LR. No. 10426, which land had already been compulsorily acquired through Gazette Notice No. 6320 of 11th August 2006 and formed part of the road reserve and that therefore the suit property was not compulsorily acquired but as the petitioners' developments were located on the road reserve, the award for compensation made on 22nd February 2021 being Kshs. 1,793,073/- and Kshs. 3,404,449/- respectively, were done in compliance with the World Bank Operational Policy on Involuntary Settlement only on the basis that they were affected by the project which was funded by the World Bank. They stated that they forwarded the aforesaid sums to the National Land Commission for payment to the petitioners and maintained that they discharged their obligations under the World Bank Operational Policy on Involuntary Settlement.
29. Upon hearing the petition, on 25th May 2022, this court found that the petitioners had not proved that they were entitled to more funds than monies awarded by the respondents under the World Bank Operational Policy on Involuntary Settlement of Kshs. 1,793,073/- and Kshs. 3,404,443/-. Further that the suit property is public land having already been compulsorily acquired and therefore could not be reacquired by the state for a second time. The court further found that as the suit property was public land, the petitioners were not entitled to compensation under Article 40 (3) of *the Constitution*. Lastly, the court held that the petitioners did not present their own valuations or any other evidence to show that improvements in the suit property were worth more than the awarded amounts and the court proceeded to dismiss the petition.
30. In the current suit, the plaintiffs are the same as the petitioners in the previous suit. Besides, the respondents in the previous suit, the plaintiffs also sued Gimu Development Company (K) Limited and the Land Registrar Machakos District and sought the following orders;
- (a) declaration that the plaintiffs are Persons affected by the Project (PAPs) - Construction of the second carriageway of Athi River – Machakos Turn Off (A109) Road Project and are thus eligible for compensation under the World Bank Operation Policy on Involuntary Settlement.
 - (b) An order directing the defendants to pay to the 1st plaintiff the following amounts under the World Bank Operation Policy on Involuntary Settlement.



Item	Amount (Kshs)
Value of structures and improvements erected on road reserve Add 15% Statutory Adjustment	8,850,000 1,327,500
Injurious affection for the remaining reduced plot portion which is too small for economical use indefinitely i.e (0.0171Ha)	1,500,00
Loss of Rental Income from the Commercial Building; metal workshop, salon etc. at Kshs. 60,000 per month	1,440,000
Total	13,117,500
Items	Amount (Kshs)
Value of structures and Improvements erected on road reserve Add 15% Statutory Adjustment	27,180,000 4,077,000
Injurious affection for the remaining building portion i.e 0.0171Ha and 0.0167 Ha respectively, which are too small for economical use indefinitely and considering that there is not enough space to shift the affected staircases	15,000,000
Loss of Income: From sales of fuel at Ksh. 50,000 net income per month plus Ksh. 35,000 from the restaurant, thus Ksh. 85,000 for at least 24 months before the 2 nd plaintiff secures another investment elsewhere	2,040,000
Loss of Rental Income	4,800,000
Total	53,097,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/58 - 0.0171 Ha or o.042 acre	4,500,000
Value of Improvements thereon	4,100,000
Add 15% Statutory Adjustment	1,290,000



Total	9,890,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/509 – 0.0171 Ha or 0.042 acre	4,500,000
Land: Mavoko Town 64 (Gimu)/ 510 – 0.0167Ha or 0.042acre	4,200,000
Value of Improvements thereon (509 & 510)	50,000,000
Add 15% Statutory Adjustment	8,805,000
Add loss of rental income	18,000,000
Total	85,505,000

- (c) An order directing the defendants to pay to the 2nd plaintiff the following amounts under the World Bank Operational Policy on Involuntary Settlement.



Item	Amount (Kshs)
Value of structures and improvements erected on road reserve Add 15% Statutory Adjustment	8,850,000 1,327,500
Injurious affection for the remaining reduced plot portion which is too small for economical use indefinitely i.e (0.0171Ha)	1,500,00
Loss of Rental Income from the Commercial Building; metal workshop, salon etc. at Kshs. 60,000 per month	1,440,000
Total	13,117,500
Items	Amount (Kshs)
Value of structures and Improvements erected on road reserve Add 15% Statutory Adjustment	27,180,000 4,077,000
Injurious affection for the remaining building portion i.e 0.0171Ha and 0.0167 Ha respectively, which are too small for economical use indefinitely and considering that there is not enough space to shift the affected staircases	15,000,000
Loss of Income: From sales of fuel at Ksh. 50,000 net income per month plus Ksh. 35,000 from the restaurant, thus Ksh. 85,000 for at least 24 months before the 2 nd plaintiff secures another investment elsewhere	2,040,000
Loss of Rental Income	4,800,000
Total	53,097,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/58 - 0.0171 Ha or o.042 acre	4,500,000
Value of Improvements thereon	4,100,000
Add 15% Statutory Adjustment	1,290,000



Total	9,890,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/509 – 0.0171 Ha or 0.042 acre	4,500,000
Land: Mavoko Town 64 (Gimu)/ 510 – 0.0167Ha or 0.042acre	4,200,000
Value of Improvements thereon (509 & 510)	50,000,000
Add 15% Statutory Adjustment	8,805,000
Add loss of rental income	18,000,000
Total	85,505,000

- (d) An order directing the 2nd and 3rd defendants to compensate the 1st plaintiff the following amounts under the World Bank Operational Policy on Involuntary Settlement for the value of the remaining land portions as they are too small for economic use.



Item	Amount (Kshs)
Value of structures and improvements erected on road reserve Add 15% Statutory Adjustment	8,850,000 1,327,500
Injurious affection for the remaining reduced plot portion which is too small for economical use indefinitely i.e (0.0171Ha)	1,500,00
Loss of Rental Income from the Commercial Building; metal workshop, salon etc. at Kshs. 60,000 per month	1,440,000
Total	13,117,500
Items	Amount (Kshs)
Value of structures and Improvements erected on road reserve Add 15% Statutory Adjustment	27,180,000 4,077,000
Injurious affection for the remaining building portion i.e 0.0171Ha and 0.0167 Ha respectively, which are too small for economical use indefinitely and considering that there is not enough space to shift the affected staircases	15,000,000
Loss of Income: From sales of fuel at Ksh. 50,000 net income per month plus Ksh. 35,000 from the restaurant, thus Ksh. 85,000 for at least 24 months before the 2 nd plaintiff secures another investment elsewhere	2,040,000
Loss of Rental Income	4,800,000
Total	53,097,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/58 - 0.0171 Ha or o.042 acre	4,500,000
Value of Improvements thereon	4,100,000
Add 15% Statutory Adjustment	1,290,000



Total	9,890,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/509 – 0.0171 Ha or 0.042 acre	4,500,000
Land: Mavoko Town 64 (Gimu)/ 510 – 0.0167Ha or 0.042acre	4,200,000
Value of Improvements thereon (509 & 510)	50,000,000
Add 15% Statutory Adjustment	8,805,000
Add loss of rental income	18,000,000
Total	85,505,000

- (e) An order directing the 2nd and 3rd defendants to compensate the 2nd plaintiff the following amounts under the World Bank Operational Policy on Involuntary Settlement for the value of the remaining land portions as they are too small for economic use.



Item	Amount (Kshs)
Value of structures and improvements erected on road reserve Add 15% Statutory Adjustment	8,850,000 1,327,500
Injurious affection for the remaining reduced plot portion which is too small for economical use indefinitely i.e (0.0171Ha)	1,500,00
Loss of Rental Income from the Commercial Building; metal workshop, salon etc. at Kshs. 60,000 per month	1,440,000
Total	13,117,500
Items	Amount (Kshs)
Value of structures and Improvements erected on road reserve Add 15% Statutory Adjustment	27,180,000 4,077,000
Injurious affection for the remaining building portion i.e 0.0171Ha and 0.0167 Ha respectively, which are too small for economical use indefinitely and considering that there is not enough space to shift the affected staircases	15,000,000
Loss of Income: From sales of fuel at Ksh. 50,000 net income per month plus Ksh. 35,000 from the restaurant, thus Ksh. 85,000 for at least 24 months before the 2 nd plaintiff secures another investment elsewhere	2,040,000
Loss of Rental Income	4,800,000
Total	53,097,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/58 - 0.0171 Ha or o.042 acre	4,500,000
Value of Improvements thereon	4,100,000
Add 15% Statutory Adjustment	1,290,000



Total	9,890,000
Item	Amount (Kshs)
Land: Mavoko Town Block 64 (Gimu)/509 – 0.0171 Ha or 0.042 acre	4,500,000
Land: Mavoko Town 64 (Gimu)/ 510 – 0.0167Ha or 0.042acre	4,200,000
Value of Improvements thereon (509 & 510)	50,000,000
Add 15% Statutory Adjustment	8,805,000
Add loss of rental income	18,000,000
Total	85,505,000

- (f) An order directing the 4th defendant to issue to the 1st plaintiff title deed for the remainder of the portion measuring 0.0171 Ha of Mavoko Town Block 64 (Gimu)/ 508, and to the 2nd plaintiff title deed for the remainder of the portions measuring 0.0171 Ha and 0.0167 Ha of Mavoko Town Block 64 (Gimu) 509 and 510 respectively after acquisition by the 3rd defendant of 0.0171 Ha, 0.0171Ha and 0.0167 Ha of Mavoko Town Block 64 (Gimu) 508, 509 and 510 respectively through Gazette Notice No. 6320 of 11.08.2006.
- (g) General Damages.
- (h) Special Damages.
- (i) Cost of suit plus interest thereon from the judgment until settlement thereof in full.
- (j) Any other relief that this Honorable court may deem fit to grant.
31. The plaintiffs' case herein is that they are owners of the suit property, but vide Gazette Notice No. 9536 of 29th September 2017, the 2nd defendant sought to compulsorily acquire the suit property for construction of the second carriageway of Athi River – Machakos Turn Off Road (A109) Project in Machakos County. That upon statutory inquiries being done, they were awarded Kshs. 53,009,200/- and Kshs. 208,346,600/- which awards they accepted but that the intended acquisition was nullified and they were issued with new awards of Kshs. 1,793,073/- and Kshs. 3,404,448/- respectively, which was alleged to be compensation under the World Bank Operational Policy on Involuntary Settlement. They stated that this was done without their input and or public participation.
32. It is therefore clear that the subject matter in the previous suit and the current suit is the same. The plaintiffs herein are the petitioners in the former suit while they have now added the Land Registrar and Gimu Development Company (K) Ltd as defendants in the current suit. The cause of action herein is that the plaintiffs are unhappy with the awards of Kshs. 1,793,073/- and Kshs. 3,404,448/- respectively dated 8th January 2021 made in respect of the World Bank Operational Policy on Involuntary Settlement and instead claim for Kshs. 9,890,000/- and Kshs. 85,505,000/- respectively. The plaintiffs' main contention against the defence of res judicata is that although the court in its judgment (paragraph 61) in the former suit stated that the compensation above was under



the World Bank Operational Policy on Involuntary Settlement and not for compulsory acquisition, that pronouncement was merely obiter dictum and not a decision on matters pleaded upon by the parties; because the petitioners did not make a claim for compensation under World Bank Operational Policy on Involuntary Settlement.

33. I do not agree with the plaintiffs' arguments above, because issues in a suit do not only arise from the claimant's pleadings, but from pleadings of all the parties in the suit. The judgment in the former suit clearly shows that when the petitioners claimed for compensation on the basis that their property was compulsorily acquired, the 2nd respondent in defence/response, denied having compulsorily acquired the suit property which they maintained was public land and expressly insisted that the compensation they offered the petitioners was in respect of their obligation under the World Bank Operational Policy on Involuntary Settlement as the project was a World Bank funded project and that they only paid for Involuntary Settlement. Therefore, the issue of compensation under the World Bank Operational Policy on Involuntary Settlement was raised by the 2nd respondent in the petition, hence it does not become a non-issue or a lesser issue just because the petitioners did not raise it, or because they failed to respond to it when it was raised by the 2nd respondent. In any event, that issue belonged to the subject matter in the former suit which the parties were expected to bring forward, upon exercise of due diligence and hence even if it had not been raised by the 2nd respondent, it would still not be allowed to be the basis of a fresh suit.
34. A look at the judgment in the former suit clearly show that that issue was at the core of the dispute between the parties in the former suit. I therefore take the view that the excuse that the petitioners did not seek compensation under the World Bank Operational Policy on Involuntary Settlement, when the 2nd respondent in the former suit raised the issue, cannot be the basis for re-litigation on the same issue. The respondent made it an issue and the judgment made a determination on the issue as the court found that the petitioners were not entitled to compensation under Article 40 (3) of *the Constitution* as the suit property was already public land and could not be compulsorily acquired for the second time, and that there was no evidence by the petitioners to demonstrate that the awards made under the World Bank Operational Policy on Involuntary Settlement of Kshs. 1,793,073/- and Kshs. 3,404,448/- respectively were inadequate. It therefore follows that the findings of the court in the former suit on the question of an award under the World Bank Operational Policy on Involuntary Settlement cannot be said to be obiter dictum but is a finding on one of the issues in dispute.
35. In view of the above, I find and hold that the issues and matters directly and substantially in the former suit are the same issues and matters directly and substantially in the current suit.
36. Regarding, the question of similarity of the parties in the former suit and in the current suit, it is clear that save the fact that the plaintiffs herein added the Land Registrar and Gimu Development (K) Limited in the current suit, the parties in the former suit and in the current suit are the same. It is however clear that this addition is cosmetic and does not alter the character of the plaintiffs' claim. At any rate nothing stopped the plaintiffs herein from including the Land Registrar and Gimu Development (K) Company Limited in the previous suit. In the premises, I find and hold that the parties in the former suit and in the current suit are the same and the addition of two new parties in the instant suit is for cosmetic purposes and does not change the fact that the matters raised in the current suit are matters that have been determined on merit in the former suit and the plaintiffs herein cannot evade the doctrine of res judicata on the basis of addition of new parties to this subsequent suit.
37. On the competence of the court that determined the previous suit, it is clear that the former suit was heard and determined by the Environment and Land Court, which had jurisdiction to determine the issue of compulsory acquisition of land and incidental issues thereto, and indeed the plaintiffs herein



conceded to this position. The Environment and Land Court is the competent court to hear and determine the current suit. I therefore find and hold that the judgment in the former suit was made upon merit determination of the dispute, was final and was made by a competent court.

38. For the above reasons, I find and hold that in view of the judgment from a competent court made on 25th May 2022 in Machakos ELC Petition No. 8 of 2021, Mirriam Louise Mareka & Gerald Gacheru Wambugu Vs. The National Land Commission, The National Highways Authority and The Honourable Attorney General; which determined on merit and with finality, the questions of compulsory acquisition and compensation based on World Bank Operational policy on Involuntary settlement, regarding the suit property, between the parties herein, this suit is res judicata. I hereby dismiss this suit with costs to the defendants.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Kamau holding brief for Ms. Karanu for the 3rd Defendant

Mr. Ayieko for the Plaintiff

Mr. Othim for the 1st defendant

No appearance for the 2nd, 4th and 5th defendants

Court Assistant- Abdisalam

