



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 155 OF 2019**

**MARGARET MWIHAKI NJOROGE** (*suing as legal representative of the estate of the late*

**STANLEY NJOROGE MUTHIORA**).....1<sup>ST</sup> PLAINTIFF/RESPONDENT

**GABRIEL MURIRA MUTHIORA**.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

**AND**

**GRACE NJOKI MBUGUA**

**RACHEAL WAITHIRA MBUGUA** and

**MOSES MUTURI MBUGUA** (*being sued as the legal representatives of the estate of the late*

**JAMES MBUGUA KIMOTHO**).....1<sup>ST</sup> DEFENDANT/APPLICANT

**EDWARD NJUGUNA NGUGI**.....2<sup>ND</sup> DEFENDANT/APPLICANT

**MOSES MUTURI MBUGUA,**

**EDWARD NJUGUNA NGUGI** and

**HEZRON KABURU BORO** (*being sued as the legal representatives of the estate of the late*

**WAIRIMU KIMOTHO**).....3<sup>RD</sup> DEFENDANT/APPLICANT

**RULING**

The Defendants herein brought a Notice of Motion Application dated 25<sup>th</sup> February 2020 and filed on 27<sup>th</sup> February 2020 expressed to be brought under Section 7 and 63 of the Civil Procedure Act, Order 2 Rule 15, Order 51 Rule 1 & 3 of the Civil Procedure Rules, Article 40 and 159 of the Constitution of Kenya seeking the followings orders;

1. That the Honorable Court be pleased to strike out this suit for being an abuse of the Court process.
2. That the Defendant be awarded costs of this application and suit.

The application is grounded in the affidavit sworn by **MOSES MUTURI MBUGUA** who averred that the Plaintiffs/Respondents have instituted various suits against the Defendants touching on the same subject matter **TITLE NUMBER KABETE/KIBICHIKU/205**, and most of the said suits were heard and determined by Courts of competent jurisdiction. He annexed and marked MMM1 copies of some pleadings and decisions and listed the following as previous suits lodged by the Plaintiffs/Respondents;

(a) **NRB HC SUC NO.249 of 2012 in the matter of the Estate of Mary Wairimu Kimotho alias Wairimu Kimotho (deceased) now Kiambu High Court Succession No 90B of 2016.**

(b) **NRB HC SUC 248 of 2012.**

(c) *NRB JR NO. 8 OF 2008.*

(d) *NRB HCCC No. 567 of 2009 and*

(e) *NRB HCCC 1030 of 2012*

He deponed that the issue of trust was completely litigated and **Hon. Justice W. Musyoka** rendered his decision touching on the subject matter in the Judgement delivered in **NRB HC SUC NO.249 of 2012**, in the matter of the **Estate of Mary Wairimu Kimotho alias Wairimu Kimotho** (deceased) and annexed the said Judgement as MMM2. He further deponed that the Plaintiffs/Respondents lodged an Appeal in the Court of Appeal, but have never prosecuted the same. That he is advised by his advocates that the Plaintiffs/Respondents cannot pursue the current suit, when the same issues were fully and effectively determined by a Court of competent jurisdiction, thus the suit lacks substance, is frivolous and vexatious and an abuse of the Court process.

The application is opposed by **GABRIEL MURIRA MUTHIORA** via his Replying Affidavit filed on 29<sup>th</sup> October 2020, and deponed that contrary to the allegations raised by the applicants, the ownership of the parcel of land known as **KABETE/KIBICHIKU/205**, has never been determined in any forum and that the **NRB HC SUCC NO. 249 of 2012**, related to issuance of letters of administration in respect of the estate of the late **MARY WAIRIMU KIMOTHO**, and the net effect of the Judgement was the revocation of the grant that had been issued to the 1<sup>st</sup> Plaintiff/Respondent pursuant to citation proceedings filed by her.

He Further deponed that **NRB HC SUCC 248 of 2012**, related to citation proceedings undertaken in respect of the estate of the late **JAMES MBUGUA KIMOTHO and the Nairobi Judicial Review No. 8 of 2008**, filed by **JAMES MBUGUA KIMOTHO and EDWARD NJUGUNA NGUGI**, which they applied for and obtained Judicial Review Orders of Certiorari and Prohibition touching on Orders that had been issued by the **KIAMBU LAND DISPUTES TRIBUNAL**. He stated that **Nairobi HCCC No. 567 of 2009**, touched on proceedings filed to injunct the intended burial of the late **JAMES MBUGUA KIMOTHO**, within **LR NO KABETE/ KIBICHIKU/205**, and that **HCC No. 1030 of 2012** related to litigation touching on the property known as **KABETE/ KIBICHIKU/2945**. The Application was canvassed by way of Written submissions.

The Court has now carefully read the Defendants/applicants Notice of Motion Application together with the rival written submissions and renders itself as follows:-

**Whether the Plaintiffs' suit is Res Judicata and should be dismissed**

The doctrine of Res judicata is found in **Section 7 of the Civil Procedure Act** which provides that:-

*“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.”*

The Court of Appeal in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR**, held that:

*“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;*

*a) The suit or issue was directly and substantially in issue in the former suit.*

*b) That former suit was between the same 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 suit in which the issue is raised.”*

*“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 a 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 a 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.”*

The Defendants/Applicants have contended in their Application that the matters that the Plaintiffs/Respondent have brought for resolution are the ones that were already heard and determined in the **NRB HC SUC NO.249 of 2012, in the matter of the Estate of Mary Wairimu Kimotho alias Wairimu Kimotho (deceased) now Kiambu High Court Succession No 90B of 2016, NRB HC SUC 248 of 2012, NRB**

JR NO. 8 OF 2008, NRB HCCC No. 567 of 2009 and NRB HCCC 1030 of 2012 and contend that the Plaintiffs/Respondent have appealed some cases but have never prosecuted them.

This Court has carefully gone through the Judgement delivered by **Hon. Justice W. Musyoka**, touching on the subject matter in the judgement delivered in NRB HC SUCC NO. 249 of 2012. The Court has also gone through the Ruling made by Hon. Justice Mbogholi Msagha in JR Misc Application 8 of 2008, filed by the applicants; the Defendants in this instant matter.

The Court has also gone through the Orders sought by the Plaintiffs/Respondents in the current suit. Having the above case laws in mind and the provisions of law, it is clear that the Plaintiffs/Respondents are claiming from the same Defendants that were also parties to the former suit. Further the title in contention in this suit is the same as the one in the former suit i.e. **NRB HCCC 1030 of 2012**. As to whether the parties are litigating on the same issues, the Plaintiffs/Respondents have averred that **NRB HC SUCC 248 of 2012, related to citation proceedings undertaken in respect of the estate of the late JAMES MBUGUA KIMOTHO and the Nairobi Judicial Review No.8 of 2008, were for Judicial Review Orders of Certiorari and Prohibition touching on orders that had been issued by the KIAMBU LAND DISPUTES TRIBUNAL.**

However, this Court notes that the Plaintiffs/Respondents have

urged the Court to make a finding that the question of trust touching on **KABETE/KIBICHIKU/205**, has never been adjudicated in any forum.

In *Independent Electoral and Boundaries Commission -vs- Maina Kiai and 5 Others [2017] eKLR* the Court stated 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 suit. It is designated as a pragmatic and common-sensical protection against wastage of the time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a 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 a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”*

In the case of *Mburu Kinyua -vs- Gachini Tuti [1978] KLR 69* the Court stated as follows:

*“Where a given matter becomes the subject of litigation in, and 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 in special circumstances) permit the same parties to open the same subject of litigation 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 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 judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.”*

The Court in its indepth analysis find that **ELC No. 1030 of 2012**, which has the same parties, same subject matter and same prayers was not determined as the Defendants never attached any judgement to persuade this Court that it was heard to finality. **Section 7 Civil Procedure Act**, provides that the matter “**has been heard and finally decided**”.

The Court understands the law to be that a matter is heard and determined after the Court has delved into the merits of the said matter and rendered a decision.

For **res judicata** to be invited and applied, the matter beyond being between the same parties, over the same cause of action and having been previously decided by a Court of competent jurisdiction must also have been heard and finally decided in the earlier suit.

In the case *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR* a decision delivered on **15<sup>th</sup> December 2017** the Court said:-

*“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;*

*(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That 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 suit in which the issue is raised.”*

The Supreme Court of India in State of Maharashtra and Another Vs National Construction Company, Bombay, Supreme Court Civil Appeal no. 1497 of 1996 delivered itself very unequivocally and said:-

***“The important words are “has been heard and finally decided.” The bar applies only if the mater directly and substantially in issue in the former suit has been heard and finally decided by a Court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata.***

The Court holds the very humble opinion that on the events obtained in **NRB HC SUC NO. 249 of 2012, did not touch on trust as alleged by the Defendants/Applicants and in ELC No. 1030 of 2012**, the Defendants/ Applicants did not attach a Judgement. Thus, the merits of the dispute have not been delved into and therefore a cardinal ingredient of **res judicata** principal shall be missing and hence, a subsequently filed matter cannot and ought not to be adjudged as **res judicata**.

To strike out this suit as being **res judicata** would be to eject the Plaintiffs/Respondent and their legal dispute into an abyss without prospect of being retrieved. If the Court ventured thus, it would have failed in promoting the core duty of the Court which is to strive to sustain claims for purpose of being heard. See the case of D.T. Dobie & Company (Kenya) Ltd...Vs... Muchina [1982] KLR 1 where the Court held that:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

Based on the foregoing reasons, the Court is unable to find that this suit is bad in law for being **res judicata**. Thus the Defendants/Applicants Notice of Motion dated **25<sup>th</sup> February 2020**, is found **not merited** and the same is hereby dismissed entirely with costs to the Plaintiffs/Respondents.

It is so ordered.

**Dated, signed and Delivered at Thika this 22<sup>nd</sup> day of April 2021.**

**L. GACHERU**

**JUDGE**

**22/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Mokaya for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents**

**No appearance for the 1<sup>st</sup> Defendant/Applicant**

**No appearance for the 2<sup>nd</sup> Defendant/Applicant**

**No appearance for the 3<sup>rd</sup> Defendant/Applicant**

**L. GACHERU**

**JUDGE**

22/4/2021