



**Congregation of the Sisters Saint Mariana of Jesus (K) Suing through Its
Registered Trustees v Njuguna & 3 others (Environment & Land Case
31 of 2019) [2023] KEELC 20600 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 31 OF 2019
LC KOMINGOI, J
OCTOBER 5, 2023**

BETWEEN

CONGREGATION OF THE SISTERS SAINT MARIANA OF JESUS . PLAINTIFF

AND

**STANLEY MUIRU NJUGUNA 1ST DEFENDANT
PATRICK KURIA KIMITI 2ND DEFENDANT
LAND REGISTRAR KAJIADO 3RD DEFENDANT
COUNTY SURVEYOR KAJIADO 4TH DEFENDANT**

RULING

1. This is the preliminary objection dated February 28, 2023 on the ground:
 - 1) That the suit as filed is *res judicate* under section 7 of the *Civil Procedure Act* (cap 21) Laws of Kenya by dint of a Ruling delivered on October 18, 2018 in Re Estate of Eliud Njuguna (Deceased) by Hon. Lady Justice M.W. Muigai sitting at the High Court of Kenya at Nairobi.
2. In response the 1st defendant filed grounds of opposition dated April 13, 2023.
3. On the April 7, 2023, the court with the consent of parties directed that the preliminary objection be canvassed by way of written submissions.
4. I have considered the preliminary objection the grounds, the response thereto, the written submissions and the authorities cited. The issue for determination is whether this preliminary objection is merited.
5. It is not in dispute that there were succession proceedings in the High Court Family Division involving the estate of Eliud Njuguna (Deceased).



In her ruling delivered on 18/10/2018 Mungai J stated as follows;

“From the evidence above; it is clear that since the Land Survey Office that surveyed these parcels of land, made boundaries, gave new numbers and issued mutation forms and they were duly registered with the Lands Registry Office; Ngong/Ngong/1631 exists to date as per the mutation form, the green card and copy of title. If it does not exist on the ground due to alleged overlap and the other parcels were also surveyed by Land Survey Office personnel, then the buck stops with Land Survey Office to confirm where and when Ngong/Ngong/1631 disappeared to and whom is responsible.....” the estate of the deceased Eliud Njuguna Muiru is entitled to Ngong/Ngong/1631 as per the copy of title that is written his name, the green card and mutation forms. The said property is available for distribution by beneficiaries of the deceased’s estate. All other occupiers and alleged owners of the part that comprises of Ngong/Ngong/1631 in the sketch ki-k5 by Land Surveyor are trespassers and should vacate the said portion of land forthwith. They can pursue their claim from the vendors in the Environment and Lands Court.....Law Enforcement Agencies to supervise enforcement of this order and the Estate of Eliud Njuguna Muiru to realize their property Ngong/Ngong/1631 in the absence of an appeal to the Court of Appeal.”

6. In the case of *David Kiplating Chemei v. Kanamoi Cheptoo Kimoituk & another* (2021)eKLR the Court of Appeal; while quoting with approval the case of *IEBC v Maina Kiai & 5 others* (2017)eKLR stated that;

“Thus, for the bar or res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”

I agree with the 2nd defendant’s submissions that none of the parties herein were parties in the succession cause.

7. In the ANM v PMN (2016) eKLR it was held;

In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of *Henderson v Henderson* (1843-60) All ER 378, observed thus: “.....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 under 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 case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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.”

Similarly in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR the court stated thus;

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue”.

From the foregoing it is clear that the suit herein is not res judicata. I find no merit in the preliminary objection and the same is dismissed with costs to the 2nd – 4th defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH OCTOBER 2023

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Ombati for the plaintiff present.

N/A for the Defendants.

Court Assistant - Mutisya

