REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 332 OF 2015 (O.S.)

ALEX TONNY GITONGA NJERU.....1ST PETITIONER

MARY GORETTI WANJA.....2ND PETITIONER

GRACE HELLEN MUTHONI.....3RD PETITIONER

JOHN NYAGA KIBOKO.....4TH PETITIONER

ANGELO NJAGI BONIFACE.....5TH PETITIONER

ANSELIMO KATHUNI NJERU.....6TH PETITIONER

CHARLES NJUE NJERU.....7TH PETITIONER

SAMUEL MUNENE NJERU.....8TH PETITIONER

ROSE EVERLINE NJOKI.....9TH PETITIONER

ANN WAWIRA.....10TH PETITIONER

BETTY NJAGI.....11TH PETITIONER

LAWRENCE MUNYI.....12TH PETITIONER

BONIFACE NJERU.....13TH PETITIONER

PHILIP NJERU KARU.....14TH PETITIONER

DENNIS MUGAMBI NJERU.....15TH PETITIONER

ALFRED MURIITHI NJAGI.....16TH PETITIONER

ANTHONY NJAGI.....17TH PETITIONER

MARGARET M. NJAGI.....18TH PETITIONER

MARGARET WANYAGA.....19TH PETITIONER

LUKA MUNYI NJAGI.....20TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

AND

NDWIGA WAINAINA & 11 OTHERS.....INTERESTED PARTIES

JUDGEMENT

A. The Applicants'/Petitioners' case

1. By an originating summons dated 7th October 2015 brought under **Order 37 Rule 6** of the **Civil Procedure Rules** the Applicants (who later on described themselves as Petitioners) claimed to be members of Muthiga clan and sought determination of the following questions:

a. Whether the Respondent is registered as trustee of Title No. Gaturi/Nembure/3072 in trust for Muthiga clan.

b. Whether there is any good ground why the trust ought not to be determined and terminated.

c. Whether the Respondent should transfer Title No. Gaturi/Nembure/3072 to the Applicants for themselves and on behalf of members of Muthiga clan.

d. Who shall pay costs of the proceedings.

2. The said summons was supported by a brief 6-paragraph affidavit of Alex Tonny Gitonga Njeru (the 1st Applicant) sworn on 7th October 2015 and the annexures thereto. It was contended that the Applicants were all members of Muthiga clan who owned *Title No. Gaturi/Nembure/3072* ("the *suit property"*) which was registered in the name of the Respondent to hold it in trust for the clan pending resolution of an undisclosed dispute amongst the legitimate beneficiaries. The Applicants, therefore, wanted the trust to be determined and the suit property transferred to them even though they did not disclose how and when the said dispute amongst the beneficiaries was conclusively resolved.

B. The Respondent's response

3. The Respondent did not file a replying affidavit directly responding to the originating summons. However, in response to the Interested Parties' application dated 4th November 2015 for setting aside the consent judgement which was entered in favour of the Applicants on 16th October 2015 the Respondent filed a replying affidavit dated 9th December 2015 sworn by Raymond Njagi Kinyua who described himself as the County Secretary. He stated that the suit property was held by the Respondent on behalf of Muthiga clan. He further stated that the African Court in Nembure had awarded the suit property to the family of Karukenya Kariungi (deceased) in *Case No. 241 of 1943.* The said Karukenya was said to be the grandfather of the Applicants in the originating summons.

C. The Interested Parties' response

4. The Interested Parties filed two replying affidavits in response to the originating summons. They were both sworn by the 1st Interested Party, Ndwiga Wainaina, on 26th August 2016 and 17th September 2019. It was contended that the trust referred to in the instant suit was determined in *Nyeri High Court Civil Suit No. 201 of 2000 O.S* which was later designated as *Nyeri ELC No. 700 of 2014* ("the *Nyeri suit"*) before Hon. Justice J.V.O. Juma.

5. The Interested Parties contended that the court in the Nyeri suit referred the matter to the Provincial Commissioner-Eastern Province to determine the rightful beneficiaries of the suit property on 25th August 2003. It was contended that the matter was heard before the Provincial Land Disputes Appeals Committee which upon hearing the representatives of the disputing parties returned a verdict in favour of the Interested Parties, which verdict was adopted in the Nyeri suit as a judgement.

6. The Interested Parties stated that whereas the suit property was held by the Respondent in trust for Muthiga clan, the Applicants were members of Karukenya family whereas they (the Interested Parties) were members of Wainaina family. However, both the Karukenya and the Wainaina families belonged to Muthiga clan.

7. The Interested Parties further stated that members of the Applicants' Karukenya family had previously filed *Embu HCCC No. 14 of 2004 Victor Aloys Njagi, Bonifasio Njeru Karukenya & Bonaventure Njagi Karukenya Vs Ndwiga Wainaina & 12 Others* claiming the suit property but the said suit was struck out for being *res judicata.* The Interested Parties, therefore, contended that the Karukenya family had used a different set of family members to institute and prosecute the instant suit which they considered to be *res judicata* and an abuse of the court process.

8. In paragraph 30 of the replying affidavit sworn by Ndwiga Wainaina on 16th September 2019, the Interested Parties pointed out that at least 15 of the Applicants in the instant originating summons were close relatives of Victor Aloys Njagi who was the 1st Plaintiff in *Embu HCCC No. 14 of 2004.* They annexed to their affidavit an obituary of the said Victor Aloys Njagi Karukenya which pointed out the various relationships between him and fifteen of the Applicants in the instant originating summons.

9. In further response to the originating summons, the Interested Parties stated that in abuse of the court process, the Applicants filed the instant suit in 2015 and colluded with the Respondent to record a consent purporting to grant them the suit property whereas the

Respondent's trust had already been determined and the suit property granted to the Interested Parties in the Nyeri suit which had been determined much earlier.

10. Finally, the Interested Parties contended that the issue of the Respondent's trust over the suit property and the rightful beneficiaries thereof was determined by a court of competent jurisdiction in the Nyeri suit hence the instant originating summons was scandalous, vexatious, an abuse of the court process and a mockery of the judicial process. Consequently, they asked the court to dismiss the suit with costs.

D. <u>The Applicants' further affidavit</u>

11. The Applicants filed a supplementary affidavit sworn by Alex Tonny Gitonga Njeru on 18th October 2019 in response to the Interested Parties' replying affidavit sworn on 16th September 2019 by Ndwiga Wainaina. The Applicants denied knowledge of the existence of the Nyeri suit and stated that they were not parties thereto. It was their case that when they eventually became aware of it, they filed a notice of motion dated 17th December 2015 seeking to be joined therein. The Applicants further contended that whatever order or decree emanated from that suit was null and void since they were not accorded a chance of being heard.

12. In further response, the Applicants sought to rely on *Nembure African Court Civil Case No. 214 of 1943* and *Civil Appeal Case No. 16 of 1943* which it was contended had determined that the suit property belonged to the Karukenya family. The court shall refer to those two cases later in the judgement.

13. The Applicants further contended that they had reported the land dispute to the National Land Commission ("the NLC") which found that the suit property belonged to the Karukenya family and that the Wainaina family had used their wealth and influence to get judgements in their favour. The Applicants therefore urged the court to find in their favour.

E. <u>Directions on the hearing of the suit</u>

14. When the suit was mentioned on 12th February 2018 for allocation of a hearing date, all the concerned parties were directed to file and exchange their documents and statements within 90 days. When it was listed on 1st March 2019 to confirm compliance, the Applicants requested for more time to comply. By the time the suit was mentioned again on 15th May 2019 the Applicants were yet to comply.

15. On the 16th July 2019 when the suit was mentioned again to confirm compliance, the Applicants' advocate requested for 30 more days to file and serve his trial bundle. The Applicants were given a further 45 days to comply and the suit stood over to 23rd September 2019 to confirm compliance and fix a hearing date.

16. When the matter was mentioned on 23rd September 2019 the Applicants had once again not complied. This time they requested for 14 days to file a further or supplementary affidavit in response to the Interested Parties' replying affidavit filed on 17th September 2019. The parties were given a further 21 days to file all necessary documents and affidavits and prepare for hearing.

17. The matter was later on mentioned on 11th November 2019 for the purpose of fixing a hearing date. Whereas the Applicants and the Interested Parties had filed their documents, the Respondent's advocate claimed that she had not been served with any pleadings and documents in the suit. She, therefore, requested for 21 days to peruse the necessary papers. The court thereupon fixed the suit for hearing on 27th January 2020 and granted the Respondent 21 days to file its trial bundle and prepare for hearing.

F. <u>The Respondent's application for adjournment</u>

18. When the suit was listed for hearing on 27th January 2020, the Respondent sought an adjournment on two grounds. First, that it had not complied with the pre-trial directions issued earlier. Second, that it required more time to attempt alternative dispute resolution. The Interested Parties opposed the said application for adjournment whereas the Applicants supported the same. The court declined to adjourn the suit since it found that there was no good reason to adjourn the suit within the meaning of **Order 17 Rule 1** of the **Civil Procedure Rules.** The court was of the opinion that the Respondent had sufficient time to engage in alternative dispute resolution and to comply with pre-trial directions.

G. <u>The summary of evidence at the trial</u>

a) <u>The Applicants' evidence</u>

19. The Applicants called 3 witnesses before closing their case. The first witness was Angelo Njagi Boniface, the 5th Applicant herein, who testified as PW1. He adopted his witness statement dated 18th October 2019 as his evidence-in-chief and produced the seven annexures to the affidavit in support of the originating summons as exhibits P1-P7. The evidence of the 5th Applicant adopted wholesale the contents of the supporting affidavit and supplementary affidavit filed in support of the originating summons.

20. The evidence of Illuminata Margaret Wamugo (PW2) and Philip Ireri Kamugane (PW3) sought to demonstrate that the suit property was bought by the late Karukenya Kariungi from Marigu clan by the payment of two cows even though they did not disclose when the said purchase took place. PW2 stated that she was a neighbour of the Karukenya family whereas PW3 stated that he was a grandson of the late Karukenya Kariungi.

b) The Respondent's evidence

21. The Respondent did not call any witnesses at the trial hereof even though its advocate cross-examined the witnesses who testified on behalf of the Applicants and the Interested Parties. The Respondent's advocate therefore closed the Respondent's case without calling evidence since he had no witnesses to call.

c) The Interested Parties' evidence

22. The Interested Parties called Ndwiga Wainaina (DW1) who testified on their behalf as their sole witness. He adopted the contents of his replying affidavit sworn on 16th September 2019 and witness statement dated 16th September 2019 as his evidence in chief. He also produced the 10 exhibits to his affidavit as exhibits D1-D10. In addition, he stated that during the land adjudication process, the Kerukenya family was given 5 blocks measuring approximately 110 acres whereas the Wainaina family was given 5 blocks measuring approximately 117 acres. It was his case that the suit property otherwise known as Makuria block was part of the 117 acres allocated to the Wainaina family.

H. Directions on submissions

23. Upon conclusion of the trial on 27th January 2020 the Applicants were given 21 days to file and serve their submissions whereas the Respondent and the Interested Parties were given 21 days upon the lapse of the Applicants' period to file theirs. The record shows that the Applicants filed their submissions on 17th February 2020 whereas the Respondent filed its submissions on 13th March 2020. However, the Interested Parties filed their submissions out of time on 6th April 2020.

I. The issues for determination

24. The court has considered the pleadings, affidavits, documents, and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

a. Whether the instant suit is res judicata, scandalous or an abuse of the court process in view of previous cases.

b. Whether the Respondent is registered as proprietor of the suit property in Trust for Muthiga clan, or any particular family of Muthiga clan.

c. If the answer to (b) is in the affirmative, whether the trust ought to be determined and the suit property transferred to the beneficiaries.

d. Who should pay costs of the suit.

J. Analysis and determinations

25. The court has considered the entire material on record and the submissions of the Applicants on the 1st issue. The court has noted that the dispute over the suit property is really between members of Karukenya family represented by the Applicants and members of Wainaina family who are represented by the Interested Parties. It is common ground that both families belong to Muthiga clan.

26. The dispute relating to the suit property dates back to the 1940s. The material on record shows that in *Nembure African Court Civil Case No. 241/1943 Kariuki Gachiati V Karukenya Kariungi* the court dismissed the Plaintiff's case and held that the suit land known as 'Makuria block' belonged to the Defendant. When the matter went on appeal before the District Commissioner (DC) in *Appeal Civil Case No. 14/1943* the court found that Karukenya had given misleading evidence to the court. The court found that the suit property had been given as a pledge to the Appellant. Consequently, the court allowed the Appellant to retain the suit property until Karukenya redeemed it by the "payment of two full grown cows in good condition."

27. None of the parties to the suit tendered any evidence as to who the Appellant, Kariuki Gachiati, was in relation to the parties appearing before the court. No evidence was tendered to indicate if the Appellant was related to any of the two families fighting over the suit property. The court was not informed if the suit property was ever redeemed by the payment of two cows as ordered by the African appellate court. The court shall advert to this matter later in the judgement.

28. The next suit which comes to light is *Nairobi HCCC No. 1369 of 1970 John Martin Karukenya & Another V Ndwiga Wainaina & 15 Others.* By that suit, the Plaintiffs who were acting on behalf of Karukenya family alleged that the Defendants had fraudulently caused themselves to be registered as owners of the Makuria Block (the *suit property*) hence they sought recovery thereof. The Plaintiffs sought to rely upon the judgement of the Nembure African Court and the *DC's Civil Appeal No. 42 of 1943.*

29. That suit was struck out *in limine* by the High Court on 7th November 1996 for disclosing no reasonable cause of action against the Defendants. On the issue of the judgement obtained by Karukenya in the 1943 cases the High Court held as follows:

> **"In paragraph 9 prayer (aa) the plaint asks for the court's declaration that the judgement in Nembure African Court Civil Case No. 241 of 1943 is still valid and that this court should make an order for vacant possession. If that judgement relates to the suit parcel of land Gaturi/Nembure/3072, then the fact of the registration of that parcel of land in the name of the Trust Land Board now the County Council of Embu on 15th December 1961 rendered the judgement in the Nembure**

African Court of no legal effect regarding the ownership of that parcel of land even if that judgement had been upheld or confirmed in the Embu Appeal Case No. 42 of 1943. This is because the Plaintiff failed to rely on that judgement during the land consolidation or adjudication in Nembure to establish their claim to ownership of the suit parcel of land. That is why they were not registered as owners on 15th December 1961 and are still yet to be registered to date. It will not therefore be proper for this court to make the declaration asked for in prayer (aa) of paragraph 9 of the amended plaint."

30. The next suit which appears to have been filed is *Nyeri HCCC No. 201 of 2000 – Ndwiga Wainaina & 11 Others V Embu County Council (O.S.).* This is the suit which was later on designated as *Nyeri ELC No. 700 of 2014* (the *Nyeri suit*). In the said suit, the Interested Parties sought determination of the following questions:

a. Whether there was any legal ground which could impede the termination of the Respondent's trust in relation to the suit property.

b. Whether the Interested Parties were beneficiaries of the trust relating to the suit property and whether they should be registered as proprietors thereof.

c. Who shall bear the costs of the suit.

31. The said application was supported by the affidavit of Ndwiga Wainaina sworn on 17th October 2000 in which it was contended that the Respondent was registered as proprietor of the suit property in 1961 in trust for members of Muthiga clan due to disagreements amongst members of the clan. It was claimed that the Respondent had upon written request refused to terminate the trust due to a competing claim lodged by one Victor Aloys Njagi Karukenya.

32. The material on record indicates that the said suit was vide a court order made on 7th May 2002 referred to the Provincial Commissioner-Eastern Province to determine the beneficiaries entitled to the suit property. It would appear that the Provincial Commissioner (PC) caused the said matter to be handled by the Provincial Land Disputes Appeals Committee ("the Committee") which heard representatives from Karukenya and Wainaina families as well as the chairman of Muthiga clan. The Committee ultimately made a decision/award in favour of Wainaina family.

33. The material on record further indicates that decision of the P.C. was presented to the Nyeri suit where it was read and adopted as a judgement by the High Court on or about 1st August 2003 thereby determining that suit in favour of the Interested Parties. The Applicants were not present during the adoption of the Committee's award as a judgement of the court.

34. It would appear that the Karukenya family did not give up upon the dismissal of *Nairobi HCCC No. 1369 of 1970.* They filed *Embu HCCC No. 14 of 2004 – Victor Njagi, Bonifasio Njeru Karukenya & Bonaventure Njagi Karukenya Vs Ndwiga Wainaina & 12 Others* to recover the suit property. Vide their plaint dated 12th March 2004 the Plaintiffs pleaded that they were adult males belonging to Karukenya house of Muthiga clan and that the Respondent (who was the 13th Defendant in the suit) was holding the suit property in trust for Karukenya Kariungi and not Muthiga clan as a whole. They, therefore, wanted the land register to be amended accordingly and for the suit property to be transferred to them.

35. It is noteworthy that in paragraph 8 of their plaint the 3 Plaintiffs pleaded that they were aware that the Interested Parties had filed the Nyeri suit but that they had not been joined in the suit even though they had resided on the suit property for over 20 years.

36. The material on record further indicates that the Defendants in that suit challenged the said suit successfully and had it struck out with costs for being *res judicata.* There is on record a copy of an order dated 31st July 2012 made by Hon. Justice H.I. Ong'undi to that effect.

37. It would appear that the Karukenya family was not disheartened by that setback either. They simply decided to bid their time for another 3 years before filing the instant suit vide the originating summons dated 7th October 2015 once more seeking to recover the suit property from the Respondent. However, this time round they did not bother to join their rivals from the Wainaina family. They were probably tired of the setbacks which arose from previous suits against the Wainainas. So, they decided to choose their target with great caution in their third legal attempt to recover the suit property.

38. By their originating summons dated 7th October 2015, the Applicants sued only the Respondent seeking determination of the 4 questions set out in paragraph 1 hereof. In a nutshell, they sought termination of the Respondent's trust over, and recovery of, the suit property. They did not join members of the Wainaina family. The Applicants and the Respondent then signed a consent letter dated 16th October 2015 in the following terms:

"By consent:

1. Judgement be entered for the Plaintiff against the Defendants in the following terms:

2. The County Government of Embu hereby admits that it is registered as trustee of Land Parcel No. Gaturi/Nembure/3072 in trust for Muthiga clan and the trust be determined by the Respondent transferring land Parcel No. Gaturi/Nembure/3072 to Alex Tonny Gitonga Njeru, Mary Goretti Wanja, Grace Hellen Muthoni, John Nyaga Kiboko, Angelo Njagi Boniface and Anselimo Kathuni Njeru for themselves and on behalf of the other Respondents and members of Muthiga clan within the next 7 days.

3. The executive officer of this court is hereby authorized to sign all documents on behalf of the parties to facilitate the

transfer of land parcel No. Gaturi/Nembure/3072 to Alex Tonny Gitonga Njeru, Mary Goretti Wanja, Grace Hellen Muthoni, John Nyaga Kiboko, Angelo Njagi Boniface and Anselimo Kathuni Njeru for themselves and on behalf of the other Respondents and members of Muthiga clan within the next 7 days.

4. Land Registrar Embu is hereby authorized to dispense with the production of the original Title deed of the land Parcel No. Gaturi/Nembure/3072 during registration of the transfer transaction.

5. All encumbrances registered over land Parcel No. Gaturi/Nembure/3072 be and are hereby lifted.

6. Cost of this suit be met by the Respondent."

39. The said consent letter was duly endorsed by the Deputy Registrar as an order of the court. However, the Applicants' victory was short-lived. The record shows that vide a notice of motion dated 4th November 2015 filed under certificate of urgency, the Wainaina's sought their joinder in the suit as Interested Parties and the setting aside of the consent judgement. They also sought an order striking out the suit on account of *res judicata.*

40. Vide a ruling dated 9th June 2016 the Hon. Justice B.N. Olao admitted the Interested Parties into the suit and set aside the said consent judgement. The court found that there was blatant evidence of collusion between the Applicants and the Respondent in the recording of the consent. The court also found that the consent was untenable in that it purported to remove certain encumbrances in the land register without according the affected parties a chance of being heard.

41. The court, however, declined to strike out the Applicants' suit on account of *res judicata.* The court found that even though the suit property had been the subject of previous legal proceedings the parties had not availed copies of the relevant pleadings hence the issue of *res judicata* could not be determined solely on the basis of an order or decree from previous proceedings. As such, the court was not satisfied that there was a clear and obvious case for striking out.

42. The Interested Parties contended that the instant suit was *res judicata,* scandalous and otherwise an abuse of the court process on account of the previous legal proceedings referred to in the preceding paragraphs. They contended that the issue of trust, the termination thereof and the issue of who were the rightful beneficiaries of the suit property were conclusively determined in the Nyeri suit. They contended that the Karukenya family was aware of those proceedings and that they participated in the proceedings before the Committee whose award was subsequently adopted as a judgement by the court.

43. The Applicants, on the other hand, contended that they were not aware of the Nyeri suit. They contended and submitted that the resultant judgement was a nullity since it was rendered without according them an opportunity of being heard. They submitted that the doctrine of *res judicata* should not applied rigidly and that the court had a discretion to relax its application in the instant case in the interest of justice. They cited the case of **Babu A (suing through the mother EA) & Another V AG & 6 Others [2014] eKLR** in support of that submission.

44. The Applicants further submitted that the Nyeri suit was ambiguous in that it did not clearly set out the particulars of the judgement hence it was incapable of being executed. It was further submitted that the judgement in the Nyeri suit was null and void by virtue of **Section 4 (4)** of the **Limitation of Actions Act (Cap. 21)** hence could not result into a subsequent suit being rendered *res judicata.* The Applicants cited the cases of **M'Ikiara M'rinkanya & Another V Gilbert Kabeere M'Mmbijewe [2007] eKLR and National Bank of Kenya Ltd V Devji Bhimji Sanghani & Another [2016] eKLR** for the proposition that a judgement becomes statute barred upon expiry of 12 years from the date of its delivery.

45. The elements of *res judicata* are set out in **Section 7** of the **Civil Procedure Act (Cap. 21)** which stipulates, *inter alia,* 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.

(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.

(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.

(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.

(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.

(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.

(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." (emphasis added)

46. There is no dispute that the Applicants were not parties to the Nyeri suit. However, the court is unable to agree with the Applicants that they were not aware of the existence of the Nyeri suit or that they did not have an opportunity of canvassing the matters raised in that suit. In their supplementary affidavit of 18th October 2019 the Applicants claimed that they became aware of that suit in 2015 when they filed the notice of motion dated 17th December 2015 seeking to be joined in that suit.

47. The court is further unable to agree with the Applicants that they were unaware of the Nyeri suit until 17th December 2015 for at least two reasons. First, when three members of Karukenya family filed *Embu HCCC No. 14 of 2004* vide a plaint dated 12th March 2004 they pleaded the existence of the Nyeri suit in paragraph 8 of the plaint. They lamented that they had not been joined in the suit. Secondly, there is abundant documentary evidence on record to demonstrate that members of Karukenya family testified and actively participated in the proceedings before the Committee upon a referral of the Nyeri suit to the PC for determination of the beneficiaries.

48. The material on record indicates that not only did the chairman of the entire Muthiga clan testify before the Committee but members of Karukenya family namely, Bonaventure Njagi Karukenya, Victor Aloys Njagi Karukenya, and John Martin Karukenya also testified. The material on record indicates that the Applicants herein are close relatives of the 3 Karukenya family members who testified before the Committee. In the circumstances, the court finds that the Karukenya family was aware of the proceedings in the Nyeri case at least as early as 2002 when their members testified before the Committee or at the very latest at the time of filing *Embu HCCC No. 14 of 2004.*

49. The court is of the opinion that even though the Applicants were not joined in the Nyeri suit, they were obligated to act diligently by applying to be joined in the suit. It is not clear why they waited until 17th December 2015 (more than 12 years later) to file an application for joinder. The court is further of the opinion that the solution to the Applicants' grievances did not lie in filing a fresh suit but in joining the Nyeri suit and ventilating their issues there. That is what the Interested Parties herein did when they discovered that the instant suit had been filed and a consent judgement obtained in their absence. The court is of the opinion that the Interested Parties could not legitimately have filed a fresh suit upon realizing that they had been omitted from the instant suit.

50. It is no wonder that when the Karukenyas filed *Embu HCCC No. 14 of 2004* it was simply struck out by the court for being *res judicata.* The matters directly and substantially in issue in that suit were the same ones which were directly and substantially in issue in the Nyeri suit which issues had already been determined by a court of competent jurisdiction. There is no indication on record whether the Karukenyas ever appealed the striking out order and, if so, with what result. In those circumstances, it is highly doubtful if the instant suit is sustainable because the matters being raised herein are the same matters which were directly and substantially in issue in a previously decided suit.

51. In the opinion of the court, once it was held in *Embu HCCC No. 14 of 2004* that the suit was *res judicata* by reason of the existence of the Nyeri suit, then it would follow that every subsequent suit by the Karukenya family raising the same matters would also be *res judicata.* As such, the court is of the opinion that the instant suit is clearly *res judicata.* All the matters relating to the existence and determination of the Respondent's trust over the suit property were conclusively determined in the Nyeri suit. The court in the Nyeri suit determined the matters in controversy in favour of the Interested Parties and granted them the suit property. That was definitely a judgement *in rem* which declared rights against the whole world on the issue of trust. The Applicants should not expect another court to adjudicate over the same issue and award them the suit property.

52. In case the court is wrong on the issue of *res judicata* the court is of the opinion that on the basis of the material on record the instant suit is scandalous and an abuse of the court process. There is sufficient material on record to demonstrate that the Karukenya family was aware of the proceedings in the Nyeri suit where all the issues in controversy herein were canvassed and determined.

53. The material on record further indicates that the Karukenyas did not take diligent steps to join the Nyeri suit to enable them ventilate the matters in controversy. They only appear to have taken faint-hearted measures on 17th December 2015 whose outcome was not clearly demonstrated at the trial. There is evidence on record to demonstrate that the Karukenyas have shown a pattern of filing suit after suit over the same subject matter as demonstrated by *Nairobi HCCC No. 1369 of 1970, Embu HCCC No. 14 of 2004* and now *Embu ELC No. 332 of 2015.* It is also worth pointing out that in its ruling dated 9th June 2016 the court found that the Applicants and the Respondent herein had colluded to have a consent judgement recorded in the absence of the Interested Parties herein. It is thus clear to the court that the Applicants are treading on the path of abuse of the court process in filing the instant suit whilst well aware that they have failed in previous suits before the High Court and whilst aware that the same issues had been conclusively determined in the Nyeri suit.

54. The court is unable to agree with the Applicants' submission that the decree in the Nyeri suit was a mere nullity. Whether or not the decree has become statute-barred is a matter for consideration by the court executing the decree. There is no application before this court for execution of that decree. The court is further of the opinion that even if the decree in the Nyeri suit were to be found by a competent court to have become time-barred that would not preclude the instant suit from being an abuse of the court process. The court takes the view that if a matter has been ventilated before a competent court and conclusively determined, it cannot be revived for fresh litigation after the passage of 12 years from the date of the judgement. If that were permissible in law, there would be no end to litigation for the ghosts of long concluded litigation would keep springing to life every 12 years. The 1st issue is consequently answered in the affirmative.

55. The 2nd issue is whether the suit property was registered in the name of the Respondent in trust for Muthiga clan or any particular family of Muthiga clan. As indicated before, the issue of trust was conclusively determined in the Nyeri suit. And in view of the court's finding that this suit is *res judicata,* scandalous and otherwise an abuse of the court process it may not be necessary to determine this issue once more. However, in case the court is wrong on the 1st issue the 2nd issue shall be considered and determined.

56. The court has considered the evidence and submissions on record on the 2nd issue. There is no doubt that the Respondent was registered as proprietor of the suit property in trust for Muthiga clan during the land adjudication process because of some undisclosed disagreements amongst the concerned beneficiaries. The Respondent conceded that it was a trustee in is replying affidavit sworn on 9th December 2015 by

Raymond Njagi Kinyua who described himself as the County Secretary. The court is thus satisfied that the Respondent is holding the suit property in trust for Muthiga clan.

57. The second limb of the issue is the identity of the beneficiaries of the said trust within Muthiga clan. The material on record indicates that there are about 5 houses or families within Muthiga clan. The families which have laid claim to the suit property are only two namely, the Applicants' Karukenya family and Interested Parties' Wainaina family.

58. The Applicants contended that they were the intended beneficiaries of the trust whereas the Interested Parties contended otherwise. The Applicants relied upon the judgements of the *Nembure African Court in Case No. 241 of 1943* and *DC's Appeal Civil Case No. 16/1943* and in support of their claim. They also relied upon the oral evidence of PW2, and PW3 at the trial. The Interested Parties claimed to be the legitimate beneficiaries mainly on the basis of the decision of the Committee which was adopted as a judgement by the High Court in the Nyeri case.

59. The court has considered the judgement of the *African Court in Case No. 241 of 1943.* That judgement is over 70 years old and it does not appear to have been executed or implemented at all. It is thus clearly impotent by virtue of **Section 4 (4)** of the **Limitation of Actions Act (Cap. 22).** Moreover, that judgement was varied by the *DC's Appeal Civil Case No. 16 of 1943* which found that the suit land had been pledged to the Appellant (Kariuki wa Gachiati) and it was directed that he should retain the land until Karukenya redeemed it "by payment of two full grown cows in good condition." As indicated earlier, no credible evidence was tendered as to whether Karukenya ever redeemed the suit property in the manner ordered in the judgement of the appellate court.

60. The court has considered the evidence of PW2 who claimed to be a neighbour of the Karukenya family. She stated that she moved into the neighbourhood of the suit property about 1976 and that she heard from her father that Karukenya had two wives and that he had acquired the suit property by payment of two cows to Marigu clan. Her evidence was clearly hearsay. The dispute over the suit property had been raging for over 30 years before PW2 moved to the neighbourhood of the Karukenyas. The court is not satisfied that PW2 was privy to the particulars of its acquisition or redemption. The evidence of PW3 who was a grandson of Karukenya was not helpful either. Although he supported the claim that his grandfather acquired the suit property from Marigu clan by giving the latter two cows, he conceded during cross examination by the advocate for the Interested Parties that he was very young at the material time and he merely heard people say that two cows were given. The evidence of PW3 was also hearsay.

61. The Applicants also sought to rely upon a letter dated 12th January 2017 from the NLC in support of their claim that they were the intended beneficiaries of the suit property. The court has carefully perused the contents of the said letter. The court finds that the purpose of the said letter has been taken completely out of context. It does not convey a decision or determination of the NLC made pursuant to **Article 67** of the **Constitution of Kenya** and the **National Land Commission Act, 2012.** The letter expressly declares in paragraph 4 thereof that it was requesting for referral of the dispute to the Commission for arbitration and investigation of alleged historical injustices.

62. The basis of the said request was a raft of unsubstantiated allegations attributed to the Karukenya family one of which was an allegation that the Wainaina family had been using their wealth and influence to obtain judgements in their favour hence they wanted the matter referred to alternative dispute resolution. That unsubstantiated and scandalous allegation was repeated by the Applicants' advocates in paragraph 17 of their written submissions. The Applicants' advocate submitted that the NLC had visited the suit property and "made independent findings" as contained in the said letter of 12th January 2017. One of the so called "independent findings" was that the Wainainas had improperly influenced the judiciary in order to obtain favourable orders and judgements.

63. The court, therefore, finds no evidence that the NLC ever made a determination that the Karukenyas were the intended beneficiaries of the trust by their letter dated 12th January 2017. That letter to the Registrar of the court was merely requesting for referral of the matter to alternative dispute resolution and for investigation of alleged historical land injustices. It was not evidence of the truth of the allegations contained therein. However, the material on records shows that none of the parties to the suit ever formally sought referral of the suit to alternative dispute resolution. The Applicants had not even filed such application by the time the suit came up for trial.

64. The court is also of the opinion that the allegations by the Karukenya family that the Wainaina family had corruptly and unlawfully influenced judicial decisions in their favour in the past were matters to be distinctly pleaded and specifically proved by the Applicants. Those allegations of improper influence of judicial officers were not pleaded in the originating summons. So, there is no legal basis upon which this court can ignore previous judicial decisions on the matters in issue in this suit merely upon a bare allegation that those judgements and orders in favour of Wainaina family were obtained corruptly or through improper influence. The court must add that such corrupt and improper conduct must have been reported to competent authorities and determined to be credible before they can be acted upon in any subsequent legal proceedings.

65. Although the judgement of the African courts in *Case No. 241 of 1943* and *Appeal No. 16 of 1943* are time-barred by now, it was not demonstrated why the Karukenyas could not enforce the judgements during their validity period. It was not explained why they could not make use of those judgements during the process of land adjudication to enable them obtain registration of the suit property in their name. The court is aware that such judgements may not be legally binding during the land adjudication process but they may be taken into account to establish a claim over the property in issue.

66. There is ample evidence on record to demonstrate that the issue of who were the intended beneficiaries of the suit property was determined by the High court in the Nyeri suit. The material on record indicates that the High court did not take it upon itself to determine the identity of the intended beneficiaries. It referred the matter to the P.C. of the then Eastern Province who referred it to the Committee for resolution. The record shows that members of the Karukenya and Wainaina families gave evidence before the Committee. The chairman of Muthiga clan one Lewis Godfrey Wambugu Mugo also gave evidence before the Committee. The Committee returned a verdict in favour of Wainaina family which decision was conveyed to the High Court which adopted it as a judgement.

67. The court has noted that none of the warring families of Muthiga clan objected to the jurisdiction of the Committee to deliberate on the matter referred to them and to determine the rightful beneficiaries as directed by the High court. There is no indication that the Karukenya

family ever sought a review or setting aside of the court order referring the matter to the PC to determine the beneficiaries of the suit property. Since the Applicants were aware of the existence of the Nyeri suit, they cannot legitimately challenge the actions taken and orders made by the High court in the instant proceedings. The court, therefore, finds and holds that the Interested Parties are the rightful beneficiaries of the suit property on the basis of the material on record.

68. The 3rd issue is whether the trust ought to be determined and the suit property transferred to the rightful beneficiaries. The court has already held that the Respondent was holding the suit property in trust for members of Muthiga clan. The court has also found that the beneficiaries of the trust were determined in the Nyeri suit to be the Wainaina family represented by the Interested Parties. The court is of the opinion that since the issue relating to the trust, its determination and the identification of the beneficiaries was conclusively determined in the Nyeri suit it would be superfluous to make similar orders. Moreover, since the Applicants are the ones who were seeking orders in their favour and they have failed to prove their case, then such orders cannot be granted in this suit.

69. The 4th and final issue is on costs of the suit. Although costs of an action are usually at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** As such, a successful litigant should normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] E.A. 287.** The court finds no good reason to deprive the successful parties of the costs of the action. Accordingly, the Interested Parties are hereby awarded costs of the suit to be borne by the Applicants. The Respondent is not entitled to any costs for colluding with the Applicants to record the consent judgement of 15th October 2015 and for needlessly attempting to scuttle the hearing of the suit on 27th January 2020.

K. <u>Summary of the court's findings</u>

70. The summary of the court's findings on the issues for determination is as follows:

a) The Applicants' suit is res judicata, scandalous, and an abuse of the court process in view of the previous cases on the same subject matter.

b) The Respondent was registered as proprietor of the suit property in trust for members of Muthiga clan due to some disagreement amongst the beneficiaries. The intended beneficiaries were ultimately determined in Nyeri HCCC No. 201 of 2000 (now Nyeri ELC No. 700 of 2014) as the Wainaina family of Muthiga clan.

c) There is no need for an order for determination of the trust and distribution of the suit property to the rightful beneficiaries since those issues were determined in Nyeri ELC No. 700 of 2014.

d) The Applicants shall pay the Interested Parties costs of the suit but the Respondent is not awarded any costs.

L. <u>Conclusion and disposal orders</u>

71. The upshot of the foregoing is that the court finds no merit in the Applicants' originating summons dated 7th October 2015. The same is consequently dismissed in its entirety for reasons given in the judgement. The Applicant shall pay the costs of the Interested Parties only.

72. It is so adjudged.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **5TH DAY** of **MAY, 2020** in the absence of the parties due to the prevailing Covid-19 situation. The judgement was transmitted to M/s Magee Law LLP Advocates for the Applicants, M/s Ngaywa & Kibet Partners LLP Advocates for the Respondent and M/s Githinji Mwangi & Co. Advocates for the Interested Parties through the email addresses which they provided.

<u>Y.M. ANGIMA</u>

<u>JUDGE</u>

<u>05.05.2020</u>