



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC L (OS) CASE NO. 20 OF 2019

DAVID

KINYUA.....PLAINTIFF

=VERSUS=

**MOSES MUTHURI MUKINDIA.....1ST
DEFENDANT**

**FLORENCE KAGWIRIA GIKUNDA.....2ND
DEFENDANT**

**ERIC MWENDA MBATINGA.....3RD
DEFENDANT**

**JULIUS KIRIMI M'MUKINDIA.....4TH
DEFENDANT**

**KABURU M'MUKINDIA M'MBATINGA.....5TH
DEFENDANT**

**M'KIRERIA M'MUKINDIA.....6TH
DEFENDANT**

RULING

1. Falling for determination in this ruling is the 1st defendant's notice of motion dated 28/2/2025. Through it, the 1st defendant [the applicant] seeks orders dismissing this suit on the ground that it is res judicata. Consequently, the key question to be determined in this ruling is whether the suit is res-judicata.

2. The application was premised on the grounds set out in the motion and in the applicant's supporting affidavit dated 28/2/2025. It was canvassed through written submissions dated 25/7/2025, filed by **M/s Kamau Nyaga & Company Advocates**. The case of the applicant is that, he is the owner of land parcel number **Abothuguchi/Katheri/4046** as confirmed by this court in its judgment rendered on 26/7/2017 in **Meru ELC Case No. 234 of 2013** [the preceding suit]. The present suit was filed by the plaintiff on 26/4/2019 after the 1st defendant filed **Githongo SPMC E & L Case No. 1"B"** of 2019 seeking an eviction order and a permanent injunction against the plaintiff. He adds that the lower court subsequently entered judgment on 17/5/2021, decreeing eviction of the plaintiff from land parcel number **Abothuguchi/Katheri/4046**. Aggrieved by the judgment of the Lower Court, the plaintiff lodged **Meru ELC Appeal No. E064 of 2021**. The said appeal was heard and disposed through a merit judgment of this court dated 24/5/2023. The plaintiff lost the appeal. The 1st defendant thereafter enforced the judgment of the trial court through eviction. It is the position of the 1st defendant that, for the above reasons, the claim in this suit is res-judicata.

3. The plaintiff opposed the application through a replying affidavit dated 30/5/2025 and written submissions dated 8/7/2025, filed by **M/s Gichunge Muthuri & Company Advocates**. The case of the plaintiff is that the application is misplaced in law and fact. He contends that his claim in the present suit is anchored on adverse possession, which is a distinct cause of action that has not been previously heard and determined by any court. He argues that none of the cases and judgments relied on by the 1st defendant [the applicant] determined the issue of adverse possession.
4. The plaintiff states that in **Meru ELC Case No. 234 of 2013**, he pursued a claim of customary trust over the suit land and this court dismissed the claim, adding that the claim of adverse possession was never pleaded in the said suit. He adds that in **Githongo SPMC E & L Case No. 1B of 2019**, the 1st defendant [the applicant] sued for eviction orders in relation to land parcel number **Abothuguchi/Katheri/4046** and he [the plaintiff] raised a defence of adverse possession but the lower court did not determine the defence because it lacked jurisdiction to adjudicate the defence. He further contends that **Meru ELC Appeal No. E064 of 2021** upheld the judgment of the Lower Court and did not make any finding on the question of adverse possession. His case is that, in previous determinations, courts dealt with the issues of trust and possession following registration. He adds that allowing the application will deny him his right to be heard under **Article 50 of the Constitution**.

5. The court has considered the application; the response to the application; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this ruling, the single issue to be determined in the ruling is whether this suit is res-judicata. I will be brief in my analysis and disposal of the issue.
6. The common law doctrine of res judicata has been enacted as part of Kenya's statute law under **Section 7** of the **Civil Procedure Act** which 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 use 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.”

7. Kenya's Parliament legislated explanatory notes defining the doctrine in details. It emerges from the substantive framework and from the explanatory notes that a party alleging res judicata must demonstrate the following essential elements. (i) previous existence of a suit relating to the same cause of action in a court of competent jurisdiction; (ii) previous determination of the same cause of action or the same issue by a court of competent

jurisdiction; and (iii) privity to the previous suit by the parties or legally recognized representatives of the parties in the offending suit.

8. Commenting on the application of the doctrine of *res judicata* in civil proceedings in Kenya, the Supreme Court of Kenya outlined the following as the essential elements of *res judicata* in ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC KLR:***

“For res judicata to be invoked in a civil matter, the following elements must be demonstrated: (a) There is a former judgment or order which was final; (b) the judgment or order was on merit; (c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and (d) There must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and see the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR.”

9. The Court of Appeal in ***Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR*** stated that the elements of *res judicata* are conjunctive rather than disjunctive. The Court of Appeal emphasized that for

a suit to be deemed as res judicata on account of a former suit, the following five elements must be established: (i) the suit or issue was directly or substantially in issue in the former suit; (ii) that former suit was between the same parties or parties under whom they or any of them claim; (iii) those parties were litigating under the same title; (iv) the issue was heard and finally determined in the former suit; and (v) the court that formerly heard and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.

10. The court in ***Henderson v Henderson (1843) 67 ER 313*** emphasized that the doctrine of res judicata applies not only to issues on which the court was actually required by parties to make pronouncements, but also to every issue which properly belonged to the subject of litigation (cause of action) in the previous suit and which the parties, exercising reasonable diligence, might have canvassed in the preceding suit. The court stated 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 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.”

- 11.** The Supreme Court of Kenya outlined the policy rationale of the doctrine of res judicata in ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others [supra]*** as follows:

“We affirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party conclusively”.

- 12.** On its part, the Court of Appeal outlined the rationale of the doctrine of res judicata in ***Independent Electoral &***

Boundaries Commission v Maina Kiai & 5 others
[2017] eKLR 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 common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, 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.”

- 13.** Is this suit [originating summons] res judicata? Put differently, has the 1st defendant established the essential elements of res judicata in this suit? Through the originating summons, the plaintiff seeks to be declared to be entitled to a portion measuring 0.130 hectares out of parcel numbers **Abothuguchi/Katheri/4045, 4046, 4047, 2594, 2596, 5054 and 5055**. The subject matter in the three suits and in the judgment that the applicant relies on was parcel number **Abothuguchi/Katheri/4046**.

This is only one of the seven (7) parcels that are the subject matters of this originating summons. At this point, there is no conclusive or definitive evidence that the other six (6) parcels are sub-divisions out of parcel number **Abothuguchi/Katheri/4046**. Consequently, the question of res-judicata can only be analysed and considered further in relation to **Abothuguchi/Katheri/4046**.

- 14.** In **Meru ELC Case No. 234 of 2013**, the plaintiff sued **Zipporah Kamwitu M'Mukindia** and **Moses Muthuri Mukindia** [the applicant] seeking: (i) a declaration that Zipporah held land parcel number Abothuguchi/Katheri/4046 in trust for him and that the transfer of the said land to Moses (the applicant) was in breach of the said trust; and (ii) an order decreeing cancellation of the name of Moses from the land register relating to the land and replacement of Moses' name with the name of the plaintiff. Under the principle in ***Henderson v Henderson (Supra)***, the plaintiff was required to bring forward the whole of his case, including the claim of adverse possession. The law of res judicata bars him against bringing the claim of adverse possession against Zipporah and Moses [the applicant]. Similarly, the law of res judicata bars him against bringing the defence of adverse possession except in a scenario where he is able to demonstrate that the judgment in the preceding suit has become stale after the lapse of 12 years and a 12 year period has lapsed from the time the judgment became stale.

- 15.** The plaintiff contended that none of the three cases and none of the judgments relied on by the 1st defendant dealt with the issue of adverse possession. The answer to that contention is found in the above excerpt from ***Henderson v Henderson (Supra)***. Indeed, Nzili J made the following observation in paragraph 20 of this court’s judgment in **Meru ELC Appeal Case No. E064 of 2021:**

“The decision was binding on the trial court. The appellant did not appeal against it at all. Further, his claim before the court touched on adverse possession, yet in the statement of defence, the appellant merely averred that he had sought adverse possession at the superior court. As at the hearing of this appeal, the appellant has not clarified what became of the said suit. If the court had pronounced itself on customary trust, it is curious that the appellant would still go to the same court to have perhaps a second bite of the cherry wearing a different cap of adverse possession.”

- 16.** Clearly, all the key elements of res judicata were established in relation to the 1st defendant and in relation to parcel number 4046. As for the 2nd - 6th defendants; and in relation to the other six parcels, there was no evidence placed before the court to establish res judicata.
- 17.** For the above reasons, this court comes to the finding that, as against the 1st defendant, and as relates to land parcel number **Abothuguchi/Katheri/4046**, this suit is res

judicata. Consequently, the plaintiff's claim is struck out only in so far as it relates to the 1st defendant and to land parcel number Abothuguchi/Katheri/4046. The plaintiff shall bear the 1st defendant's costs of this suit. The rest of the claim shall be disposed as provided under the law.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF NOVEMBER, 2025.

**B M EBOSO [MR]
ELC JUDGE**