



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E060 OF 2024

ANGELICA KENDI MATHIU.....1ST

APPELLANT

MARGARET NKIROTE MATHIU.....2ND

APPELLANT

CHARITY NAITORE MATHIU.....3RD

APPELLANT

CHRISTINE GAKII.....4TH

APPELLANT

ELIZABETH KAGWIRIA.....5TH

APPELLANT

WINFRED GATWIRI.....6TH

APPELLANT

=VERSUS=

MOSES MWIRIGI.....1ST

RESPONDENT

SAMUEL MURITHI.....2ND

RESPONDENT

ALICE NJIRU KIJUKI.....3RD

RESPONDENT

(An Appeal against the Ruling of the Principal Magistrate Court at Githongo [Hon L Sarapai - PM] dated 31/7/2024 in Githongo SPMC E & L Case No. E002 of 2024)

JUDGMENT

Introduction

- 1.** This appeal challenges the ruling rendered by the Principal Magistrate Court at Githongo [Hon L. Sarapai - PM] on 31/7/2024 in **Githongo SPMC E & L Case No. E002 of 2024**. The impugned ruling disposed the respondents' preliminary objection dated 9/3/2024. Through the preliminary objection, the respondents contended that Githongo SPMC E & L Case No. E002 of 2024 was res judicata and urged the court to strike out the suit. The Principal Magistrate Court upheld the preliminary objection and struck out the suit.
- 2.** The key issue to be determined in the appeal is whether Githongo SPMC E & L Case No. E002 of 2024 was res judicata. The appeal brings to the fore the thin interface between devolution of property under the Law of

Succession Act and customary claims. Before I analyse and dispose the key issue, I will briefly outline the background to the appeal; the grounds of appeal; and the parties' respective submissions in the appeal.

Background

- 3.** The six appellants and the 1st and 2nd respondents are siblings. They are children of the late **Samuel Mathiu Rukwaro** [*hereinafter referred to as "the late Samuel"*]. They are grandchildren of the late **Rukwaro Ithiria** [*hereinafter referred to as "the late Ithiria"*]. The 3rd respondent is their paternal aunt and a daughter-in-law to the late Ithiria. At all material times, land parcel numbers **Abothuguchi/Katheri/2237** and **468** [*hereinafter referred to as "the suit lands"*] belonged to the late Ithiria. Although the exact date when the late Ithiria died is unclear, succession relating to his estate was initiated in 1994 vide **Meru High Court Succession Cause No. 1 of 1994**. The High Court rendered a judgment in the Succession Cause on 20/12/995. The Grant of Letters of Administration relating to the estate was subsequently confirmed by the High Court on 26/5/2014.
- 4.** On 16/2/2023, the appellants filed an application in the succession cause seeking an order revoking the said Grant. The appellants contended that the grant was obtained fraudulently by the making of a false statement and concealment of the appellants' interest in the estate of the late Ithiria. The application was opposed by the 3rd

respondent who is the current administrator of the estate of the late Ithiria.

5. Vide a ruling dated 15/2/2024, the High Court [Muriithi J] rejected and dismissed the appellants' application, holding as follows:

17. All the parties herein are in agreement that the applicants' father, Samuel Mathiu Rukwaro (now deceased), was entitled to LR No. Abothuguchi/Katheri/2237 and 1/3 of LR Abothuguchi/Katheri/468. According to the rectified certificate of confirmation of grant dated 26/5/2014, LR No. Abothuguchi/Katheri/2237 and 1/3 of LR Abothuguchi/Katheri/468 were given to Moses Mwirigi Mathiu and Samwel Murithi Murimi.

18. This court finds that the respondent has proved on a balance of probabilities that the applicant's deceased father had given his entitlement in the deceased's estate to his 2 sons, subsequent to which the grant was confirmed.

19. The grant sought to be revoked was confirmed way back on 26/5/2014 while the instant application was filed on 16/2/2023. That delay of approximately 9 years is inordinate. This court finds that the applicants have not met the threshold laid

down under Section 76 of the Law of Succession Act to justify grant of the orders sought.

20. Besides, the fact that applicants are grand children to the deceased negated their claim on need to be notified and/or involved when the cause was filed, since their father, who was a direct beneficiary of the deceased, was then alive and in prior degree of priority on consanguinity table under Section 66 of the Law of Succession Act.

6. It has been contended in this appeal that, aggrieved by the above ruling of the High Court, the appellants lodged an appeal in the Court of Appeal challenging the ruling. The appeal is pending disposal by the Court of Appeal.
7. Besides lodging an appeal in the Court of Appeal, the appellants filed **Githongo SPMC E & L Case No. E002 of 2024** seeking: (i) a declaration that land parcel numbers Abothuguchi/Katheri/2237 and 468 are held in trust for them; (ii) an order decreeing cancellation of the existing titles and registration of the two parcels in the name of their late father, **Samuel Mathiu Rukwaro**; and (iii) an order directing the Land Registrar to issue a certificate of title comprising half share of the suit lands in their favour. They contended that their late father was entitled to the two parcels as a beneficiary of the estate of the late Ithiria, adding that those to whom the suit land

devolved through succession held the parcels subject to a customary trust in their favour.

8. On being served with suit papers, the respondents filed a notice of preliminary objection dated 9/3/2024, inviting the Principal Magistrate Court to strike out the suit on the ground that it was res judicata. The notice of preliminary objection itemized the following verbatim grounds:

“1. That the suit and claim is res judicata to High Court Succession Cause No. 1 of 1994 Meru High Court.

2. That the issues raised in this matter, the subject matter and the parties are the same.

3. That Section 7 of the Civil Procedure Act prohibits such claims to be filed a fresh before the same court or other courts.”

9. Upon receiving submissions on the preliminary objection, the Principal Magistrate Court rendered the impugned ruling, upholding the preliminary objection.

Appeal

10. Aggrieved by the ruling of the Principal Magistrate Court, the appellants brought this appeal, advancing the following verbatim grounds:

1. That the Learned Trial Magistrate erred in law and fact in failing to find that the cause of action which is customary trust

was to be filed and heard and determined in the court established under Article 162(2) (b) of the Constitution.

2. That the Learned Trial Magistrate erred in law and fact in failing to hold that the matter was not res-judicata as the claim of customary trust was not heard and could not be adjudicated in Meru HC Succession Cause No. 1 of 1994.

3. That the Learned Trial Magistrate erred in law and fact in failing to find that the cause of action, customary trust, is a cause separate from the succession court jurisdiction and the Environment and Land Court is the requisite jurisdiction. (sic)

4. That the Trial Magistrate Court erred in law and fact in failing to find that the jurisdiction court to wit Meru HCC Succession Cause No.1 of 1994 does not and did not hear the claim of customary trust. Therefore the plea of res-judicata cannot be sufficiently pleaded.

5. That the Learned Trial Magistrate erred in law and fact in failing to hold that the parties before court were not direct beneficiaries to the estate of the deceased vide Meru HCC Succession Cause No. 1 of 1994 hence their claim of

customary trust was to be adjudicated in the ELC Court

6. That the Learned Trial Magistrate erred in law and fact in failing to hold that res-judicata plea can be sufficiently pleaded only where the court of competent jurisdiction has exercised its judicial mind and has after arguments come to a final decision on a contested matter- in this case - customary trust.

7. That the Learned Trial Magistrate erred in law and fact in failing to find that no arguments were done in Meru HCC Succession Cause No. 1 of 1994 and no final decision was made as none could have been made in respect of the claim of customary trust as the succession court did not have competent jurisdiction over the claim.

8. That the entire decision is against the weight of evidence and the law.

11. The appellants prayed for orders allowing the appeal; setting aside the order of the Principal Magistrate Court dated 31/7/2024; and substituting the said order with an order reinstating the suit to be heard by a magistrate other than Hon Sarapai PM. They also prayed for costs of the appeal and costs of the application and the preliminary objection in the Lower Court.

Appellants' Submissions

- 12.** The appeal was canvassed through written submissions dated 1/4/2025, filed by **M/s Joshua Mwiti Law Advocates**. Counsel submitted that the parties to the appeal are related by blood by virtue of being brothers and sisters, adding that they are children of the late **Samuel Mathiu Rukwaro** and grandchildren of the late **Rukwaro Ithiria**. Counsel added that the two suit lands were the subject matters of succession in **Meru High Court Succession Cause No. 1 of 1994** relating to the estate of the late **Rukwaro Ithiria**. Counsel added that at the time of confirmation of the grant, the parties' father, **Samuel Mathiu Rukwaro**, had died, hence the share of the parties' late father, which is comprised in the suit lands, is held by the respondents. Counsel contended that at the time of confirmation of the grant, the suit lands had not been gifted to any party during the life time of Samuel Mathiu Rukwaro.
- 13.** Citing the pronouncement of the **Supreme Court of Kenya** on the essential elements of *res judicata* in **John Florence Maritime Services Ltd v Cabinet Secretary, Transport & Infrastructure & 3 others (2021) eKLR**, counsel submitted that the issue of customary trust was not heard and determined in **Meru High Court Succession Cause No. 1 of 1994**. Counsel argued that the appellants could not raise the issue of customary trust in the Succession Cause because the issue had not crystalized, adding that the issue crystalized after the Grant of Letters of Administration was confirmed.

- 14.** Counsel added that the Lower Court erred because the law which “actualized” the claim of customary trust became operational on 2/5/2012, adding that the law could not operate retrospectively. Counsel added that in the ruling dated 15/2/2022, Muriithi J held that if any claim was established by the appellants, it could only be pursued in a different cause. Citing the Court of Appeal’s pronouncement in ***Dr. Kevin Aggrey Wakoli v Housing Finance Corporation Kenya & 2 others***, counsel argued that a plea of res judicata could only be pleaded where a court of competent jurisdiction had exercised judicial mind. Counsel submitted that the claim of customary trust was not raised in the succession cause, hence the plea of res judicata could not be sustained. Counsel urged the court to allow the appeal.

Respondent’s Submissions

- 15.** The respondents opposed the appeal through written submissions dated 15/4/2025, filed by ***M/s Gikunda Anampiu & Co Advocates***. On the jurisdiction conferred under Article 162(2) of the Constitution, counsel submitted that the Article establishes the Environment & Land Court. Counsel added that **Meru HC Succession Cause No. 1 of 1994** was determined before the filing of **Githongo SPMC E & L case No. E002 of 2024**. Counsel faulted the appellants for “importing” a suit which had been determined in 1994 to have it heard and determined under the present legal framework, adding that the High

Court had the requisite jurisdiction over customary law claims in succession matters.

- 16.** On whether the essential elements of res judicata were established, counsel submitted that **Meru High Court Succession Cause No. 1 of 1994** involved the two suit lands, adding that the High Court applied itself and properly distributed the parcels without any objection from the appellants' parents "back in 1994". Counsel argued that the succession court had jurisdiction to hear any claim over trust, adding that the appellants raised their claim in the succession court and the claim was considered. Counsel argued that **Githongo SPMC E & L Case No. E002 of 2024** raised issues similar to those which the appellants raised in **Meru High Court Succession Cause No. 1 of 1994**.
- 17.** Citing **Section 7** of the **Civil Procedure Act**, counsel reiterated that the issues raised in the two suits were the same and therefore Githongo SPMC E & L Case No. E002 of 2024 was res judicata. Counsel urged the court to reject and dismiss the appeal.

Analysis and Determination

- 18.** The court has read and considered the original record of the Principal Magistrate Court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. The court has also considered the legal frameworks and the jurisprudence relevant to the key issue in the appeal. As pointed out in the introduction part of this judgment, the key issue to be answered in the

appeal is whether Githongo SPMC E & L Case No. E002 of 2024 was res judicata. I will be brief in my analysis and disposal of the issue. Before I do that, I will outline the principle that guides this court when exercising appellate jurisdiction.

- 19.** The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar Shiani (2013) eKLR*** as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

- 20.** The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reason either way.”

- 21.** Was **Githongo SPMC E & L Case No. E002 of 2024** res judicata? 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 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.”

- 22.** 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.
- 23.** 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.”

- 24.** 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.

25. 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.”

26. 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”.

27. 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.”

- 28.** The six appellants and the 1st and 2nd respondents are grandchildren of the late Rukwaro Ithiria. They are children of the late Samuel Mathiu Rukwaro who was a son to the late Ithiria. The 3rd respondent is a daughter-in-law to the late Ithiria. The two suit lands that are the subject matters of this appeal were part of the **estate** and the **free property** of the **late Ithiria**, within the meaning of **Section 2** of the **Law of Succession Act**. Indeed, that is why the two parcels were the subject matters of distribution by the Succession Court within the framework of the Law of Succession Act.
- 29.** The dispute which arose in Meru High Court Succession Cause No 1 of 1994 was the question as **to whom the entitlement of the late Samuel, out of the estate of the late Ithiria, should devolve and in what capacity**

should the entitlement devolve. The appellants contended in the Succession Court that the entitlement of the late Samuel was to devolve to his estate and was to be held in trust for eventual distribution amongst the beneficiaries of the late Samuel's estate. They sought what was described in their application as fair and appropriate distribution of the estate. The respondents' on the other hand, contended in the Succession Court that the late Samuel had gifted his entitlement to the 1st and 2nd respondents and therefore his entitlement was to devolve directly to the duo. The High Court was properly seized of jurisdiction to deal with issues relating to gifting under the Law of Succession Act, devolution of a deceased's entitlement and the capacity in which the devolved property was to be held, e.g as trustee proprietors. The High Court agreed with the respondents and proceeded to distribute the estate to the beneficiaries as absolute proprietors. The appellants had the right of appeal to the Court of Appeal. Indeed, it was alleged in this appeal that they had exercised that right of appeal by lodging an appeal to the Court of Appeal.

30. The High Court rendered itself on the above issues as follows:

“17. All the parties herein are in agreement that the applicants' father, Samuel Mathiu Rukwaro (now deceased), was entitled to LR No. Abothuguchi/Katheri/2237 and 1/3 of LR Abothuguchi/Katheri/468. According to the rectified certificate of confirmation

of grant dated 26/5/2014, LR No. Abothuguchi/Katheri/2237 and 1/3 of LR Abuthuguchi/Katheri/468 were given to Moses Mwirigi Mathiu and Samwel Murithi Murimi.

18. This court finds that the respondent has proved on a balance of probabilities that the applicant's deceased father had given his entitlement in the deceased's estate to his 2 sons, subsequent to which the grant was confirmed.

19. The grant sought to be revoked was confirmed way back on 26/5/2014 while the instant application was filed on 16/2/2023. That delay of approximately 9 years is inordinate. This court finds that the applicants have not met the threshold laid down under Section 76 of the Law of Succession Act to justify grant of the orders sought.

20. Besides, the fact that applicants are grand children to the deceased negated their claim on need to be notified and/or involved when the cause was filed, since their father, who was a direct beneficiary of the deceased, was then alive and in prior degree of priority on consanguinity table under Section 66 of the Law of Succession Act."

- 31.** It is clear from the records before this court that, as soon as the appellants' application for redistribution of the estate of the late Ithiria was rejected, they lodged **Githongo SPMC E & L Case No. E002 of 2024** praying for, among other reliefs, an order cancelling the titles relating to the two parcels and decreeing registration of the two parcels in the name of the late **Samuel Mathiu Rukwaro**. It does therefore emerge that through **Githongo SPMC E & L Case No. E002 of 2024**, the appellants were contesting the judgment and rulings of the High Court in **Meru High Court Succession Cause No. 1 of 1994** which vested in the 1st and 2nd respondents the whole of parcel number **Abothuguchi/Katheri/2237** and 1/3 of parcel number **Abothuguchi/Katheri/468** as absolute proprietors. The appellants rephrased their claim as a customary trust claim and invited the Magistrate Court to overturn the judgment and rulings of the High Court in the succession cause.
- 32.** It is clear that the question as to whom the late Samuel's share was to devolve was answered in **Meru High Court Succession Cause No 1 of 1994**. Secondly, the capacity in which the said entitlement was devolving was also answered by the High Court. There was no trustship in the devolution. The estate was to devolve to the beneficiaries absolutely. If the appellants are aggrieved by the devolution of their late father's entitlement, the avenue available to them is to contest the succession/devolution orders that relate to the entitlement of their late father.

The arena of the contest will have to be the Court of Appeal; not the Senior Principal Magistrate Court.

- 33.** Having evaluated the materials that were placed before the Lower Court, this Court comes to the conclusion that all the key elements of res judicata existed in **Githongo SPMC E & L Case No. E002 of 2024**. Consequently, it is the finding of this court that the said suit was res judicata. The result is that this appeal is rejected and dismissed for lack of merit.
- 34.** On costs, eight out of the nine parties to this appeal are siblings. They are children of the late Samuel Mathiu Rukwaro. The 3rd respondent is an aunt to the eight. She is the administratrix of the estate of the late Ithiria. The dispute in the courts would not be taking much of the courts' time if the eight had pursued succession relating to their late father's estate independently and sought devolution of their late father's estate on the platform of an independent succession cause relating to their late father's estate. They all seem to have ignored that route and to have chosen the succession cause relating to the estate of the late Ithiria as the arena of their succession contest relating to the estate of their late father. The 3rd respondent was privy to that arrangement. For the above reason, parties will bear their respective costs of the appeal.

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

B M EBOSO [MR]

ELC JUDGE

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