



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 486 OF 2017**

**BEATRICE WAMBUI MAINA (In the matter of**

**the Estate of JAMES KINYURU MUONGI (Deceased).....PLAINTIFF/APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE DISTRICT COUNTY SURVEYOR KIAMBU...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE DISTRICT LAND REGISTRAR KIAMBU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**SAMUEL WAIRIRE KINYURU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MIRIAM WAITHERA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**ANDREW NJENGA.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**BENSON KINYURU MUONGI *alias***

**BENSON WAWERU KINYURU.....7<sup>TH</sup> DEFENDANT/ RESPONDENT/APPLICANT**

**PAULINE NENDAYA NAITIPTIP.....8<sup>TH</sup> DEFENDANT/RESPONDENT/APPLICANT**

**RULING**

There are three matters coming up for determination. The *Notice of Motion* application dated **3<sup>rd</sup> May 2017**, by the Plaintiff herein, *Notice of Preliminary objection* dated **28<sup>th</sup> September 2017**, and *Notice of Motion* Application dated **31<sup>st</sup> January 2018**, by the 7<sup>th</sup> and 8<sup>th</sup> Defendants.

In the Application dated **3<sup>rd</sup> May 2017**, the Plaintiff sought for the following orders as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;

- 1. That a temporary injunction be issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents whether by themselves, servants and or agents or whomsoever is acting on their behalf in dealing in any manner in Land Title No.Muguga/ Gitaru/ 799 and particularly from drawing any maps from the illegal subdivisions done on 4<sup>th</sup> April 2017, pending the hearing and determination of this suit.***
- 2. That the costs of this Application be met by the Defendant/ Respondent.***

The Application is premised on the grounds that the suit land belonged to the Applicant's late father. While the Administrators of the estate of the deceased were in the process of subdividing the suit land, the 1<sup>st</sup> Defendant illegally came into the suit land and erected beacons on it without the beneficiaries consent and authority despite an order in ***Succession Cause No.124 of 2016***, restraining the ***District Surveyor*** from subdividing the suit land and further the existence of a caution registered on the suit land and therefore the Applicant stands to suffer loss and Damage.

In her ***Supporting Affidavit***, the Applicant reiterated the grounds in support of the application and further averred that on **16<sup>th</sup> February 2017**, the Succession Court granted orders for distribution of the estate and as there was a long delay in confirming the Grant, the

administrators were unable to register the transfer by transmission to the beneficiaries. She then consulted her Co-Administrator so that they could constitute a meeting. However, she was served with a letter from the **District Surveyor** indicating that he would be visiting the suit land for subdivision and this was without following the due process. She alleged that there was an existing **Court Order** issued on **28<sup>th</sup> December 2016**, restraining the 2<sup>nd</sup> Defendant from dealing with the suit land and despite their protests and an Application dated **23<sup>rd</sup> March 2017**, in which the orders of **2016** were, the 2<sup>nd</sup> Defendant chose to proceed with the illegal acts.

It was her contention that the 2<sup>nd</sup> Respondent having been aware of the Court Orders, it should be estopped from interfering with the affairs of the Estate as the caution registered in **2001**, is still in force and the Administrators are in the process of subdividing the suit land. She further averred that their prayers are for permanent injunction as against the 2<sup>nd</sup> Defendant to prevent him from further dealings with the suit land, the 3<sup>rd</sup> defendant from issuing any new titles in accordance with the illegal subdivisions.

The Application is opposed and the 7<sup>th</sup> Defendant who filed a **Replying Affidavit** on the **13<sup>th</sup> June 2017**. He averred that the Plaintiff/Applicant is a Co-Administrator with the 4<sup>th</sup> Defendant of his father's Estate and that the suit property is registered in the name of **James Kinyuru Muongi** and after a full hearing, the **Family Division Court** distributed it on **27<sup>th</sup> January 2012**, and ordered the **District Surveyor** to implement the subdivision at the cost of each beneficiary save for **Edwin Gitau** and **Francis Kinyuru**. He averred that after the confirmation, the Applicant dragged her feet in administering the Estate and the 2<sup>nd</sup> Defendant wrote to the **High Court** expressing non-cooperation from the Applicant. He then moved the Court to have the **Deputy Registrar** execute the documents and in the presence of the Applicant, **Hon Justice William Musyoka**, issued orders allowing the Deputy Registrar to execute papers in relation to the subdivision, the **Kiambu District Surveyor** to implement the orders, the **Officer Commanding Station, Kikuyu** to oversee the orders and each beneficiary to bear the costs save for **Edwin Gitau Kinyuru** and **Francis Karugi Kinyuru**, as evidenced by annexure **BKM-4**. He averred that the Deputy Registrar executed the transmission forms and the orders have never been varied and therefore are still valid and therefore the Plaintiff is misleading the Court that there are orders restraining subdivision as the orders issued on **26<sup>th</sup> December 2016** were discharged on **16<sup>th</sup> February 2017** as evidenced by annexure **BKM-5**. It was his contention that the Applicant did not have authority to plead on behalf of any other persons and therefore she does not have a prima facie case.

The 5<sup>th</sup> and 6<sup>th</sup> Defendants in opposing the Application filed a **Notice of Preliminary Objection** dated **28<sup>th</sup> September 2017**, in which they averred that the Application is misconceived, bad in law, and totally defective and it ought to be struck out. They averred that the **Ruling of Lenaola J.**(as he then was) delivered on **27<sup>th</sup> January 2012**, pertaining to distribution has not been varied and it is still in force and this Court cannot be asked to sit as an Appeal Court. Further that the Orders requiring the Deputy Registrar to execute transmission forms are still in force and have been effected and therefore the Application is calculated to stifle the implementation of the said orders, They averred that the Application is *res judicata* as all matters raised therein were brought to a close when the parties recorded a consent on **16<sup>th</sup> February 2017** before **Hon Justice Ngugi** in **Kiambu P & A No.124 of 2016**. They averred that the matter is *Res judicata* as all the matters raised have been determined by Courts of competent jurisdiction and the Applicant has filed a another Application in **Kiambu High Court** seeking the same orders being sought in the instant Application. It was their allegations that the Application has been overtaken by events and it is an abuse of the court process. They also filed grounds of opposition that are similar to their **Preliminary Objection**.

The 4<sup>th</sup> Defendant also filed his **Grounds of Opposition** on the **5<sup>th</sup> October 2017** and averred that he is a **Co-Administrator** of the Estate of **James Kinyuru Muongi** (deceased) together with the Applicant. He averred that the Estate of the deceased has been the subject of **Kiambu High Court Succession Cause No.124 of 2016**, which parties canvassed their issues and it has been fully settled and determined. He averred that therefore the Application is misconceived and it ought to be dismissed.

The Plaintiff filed a further Affidavit sworn on the **14<sup>th</sup> July 2017**, and averred that the 4<sup>th</sup> Defendants in collusion with the 5<sup>th</sup> to the 8<sup>th</sup> Defendants attempted to disinherit her together with the other beneficiaries. She then moved to court and was added as a

Co-administrator and when they refused to attend her meetings she went directly to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to commence process of subdivisions. She averred that unless an injunction is issued they stand to be disinherited and urged the Court to grant the orders sought.

In the Application dated **31<sup>st</sup> January 2018**, the Applicants sought for the following orders:-

- a) **That the caution lodged against the LR.Muguga/ Gitaru/799 on 8<sup>th</sup> March 2013 by one Edwin Gitau Kinyuru claiming a licensee interest be lifted and removed forthwith.**
- b) **That the Amended Plaint dated 2<sup>nd</sup> May 2017, be and is hereby struck out.**
- c) **That the costs of this Application and costs in the main suit be awarded to the 7<sup>th</sup> and 8<sup>th</sup> Defendants/Applicants.**

The Applications is premised on the ground that **Edwin Gitau Kinyuru** lodged a caution claiming a beneficiary/license interest after the suit property was distributed and his share in the estate established by the probate Court in **Kiambu Succession Cause No.124 of 2016 'Estate of James Kinyuru Muongi'**. The Probate Court ordered transmission of the Estate to proceed following the certificate of confirmation of Grant issued on **16<sup>th</sup> February 2017**, and the cautioner instead of appealing against the distribution of the Estate filed this suit seeking injunctive and inhibitory orders against the defendants until the Estate is ready to transfer and subdivide the suit property and thereby abusing the court process. Further that the main suit is a gross abuse of the Court process as it relates to similar issues which have been determined by the probate court exercising concurrent jurisdiction.

In his **Supporting Affidavit, Benson Kinyuru Muongi** reiterated the contents in the ground on the face of the Application and further averred that the Plaintiff is a co-administrator (with the 4<sup>th</sup> Defendant) of the Estate of his deceased father **James Kinyuru Muongi**, and that after a full hearing **Hon. Justice Isaac Leneola** on the **27<sup>th</sup> January 2012**, distributed the suit property as evidenced by annexure **BKM-N4(a) &**

(b) and ordered the **District Surveyor, Kiambu** to implement the sub division of the suit property at the cost of each beneficiary save for two beneficiaries i.e. **Edwin Gitau** and **Francis Kinyuru**.

After confirmation of the Grant, the Administrators took time to execute transmission forms and the 2<sup>nd</sup> Defendant wrote a letter to the **High Court Judge** in Nairobi expressing non-cooperation from the Plaintiff in implementing the subdivision and he moved the Court for orders that the Deputy Registrar do execute the necessary papers. He averred that on **29<sup>th</sup> November 2016**, the Court ordered the Deputy Registrar to execute all the Papers in relation to the suit land, the District surveyor was ordered to implement the Order and certificate of grant issued on **27<sup>th</sup> January 2012** and the **Officer Commanding Kikuyu Police Station** to oversee compliance.

He further averred that the Plaintiff in their Amended Plaintiff is misleading the court that there are orders issued restraining the subdivision on the suit property as the orders were temporary in nature and they were discharged by **Hon. Ngugi J** as evidenced by **annexture BKM-7**. A rectified **Certificate of Grant** was then issued and the Plaintiff added as a beneficiary. He alleged that the Deputy Registrar executed the transmission forms and when the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants visited the suit property to draw survey maps and put beacons, the Plaintiff went to Court to restrain the subdivision but the Court delivered a **Ruling on 16<sup>th</sup> January 2018**, dismissed the Application. He averred that since the cautioner was allocated a portion of the suit property where his house stands and access thereto only, then he cannot purport to hold the entire estate at ransom claiming a license's interest on the suit land and he urged the Court to allow the Application.

The 6<sup>th</sup> Defendant Respondent filed an **Affidavit** on the **9<sup>th</sup> May 2018** in support of the Application and averred that the 5<sup>th</sup> Defendant/ Respondent has authorized him to swear the Affidavit on his behalf. He averred that the Application is merited and ought to be granted as it will facilitate the final distribution of the Estate of **James Kinyuru Muongi(Deceased)**.

The Application is opposed and the Plaintiff swore **Replying Affidavit** and averred that she has the consent from **Pauline Wanjiku Kinyuru, Raymond Mbugua Kinyuru, Francis Karugi Kinyuru, and Edwin Gitau Kinyuru**, who are also beneficiaries of the Estate of the deceased. She averred that the 7<sup>th</sup> Defendant has never adduced any consent or authority to swear affidavits on behalf of the 8<sup>th</sup> Defendant. It was her contention that the 7<sup>th</sup> Defendant exaggerated the value of the property as he intends to sell it to an unknown buyer. It was her allegation that it is not true that the suit property was distributed on the **27<sup>th</sup> January 2012** as the court ordered for an equal share of the suit property between the beneficiaries apart from **Edwin Kinyuru** and **Francis Kinyuru**.

It was her allegation that she was not included as a beneficiary initially but she was later added as co administrator and her attempts to have the beneficiaries meet and a portion the plots that each one of them will take has been, met with hostility and the caution is what is protecting the suit property from being sold by the Applicant once the subdivisions have been done. She further averred that she has sworn an Application in which she communicated to the surveyor that they needed to agree on what plot each party shall take before beacons could be put in the premises and it was disregarded. She denied being uncooperative and accused the Applicant of the same and further averred that the secrecy and disregard of the Respondents interests as they risk being disinherited as when the beacons were placed by the 2<sup>nd</sup> Defendant the way to **Edwin Kinyuru's** house was completely removed and they may end up having no way to get to the house. She averred that she does not know the subdivision the Applicant intends to do when they have not agreed on the portions each parties was to get as his/her share of the suit property. She further averred that she has appealed against the **Ruling of Justice Lenaola** as evidenced by **annexture BM-1** and lifting the caution will open the Estate to illegal subdivisions and transfer thereafter disinherit them.

In response to the **Replying Affidavit**, the 7<sup>th</sup> Defendant filed a **Supplementary Affidavit** and denied the allegations made by the Respondent and further averred that the Plaintiff is contradicting herself that the suit property was not distributed but further alludes to how it was distributed. He further averred that the Respondent has been Administrator since **29<sup>th</sup> July 2008**, and she has been dragging her feet. He further averred that the Respondent and his siblings took flight when the police visited the suit land to subdivide the land despite being duly notified and further averred that there is no Appeal against the suit property as evidenced by **Justice Ngugi** in his Ruling being **annexture BKM-11(a)**. It was his contention that the Plaintiff is merely speculating that she will be disinherited.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered.

The Court will first deal with the issue of Preliminary Objection and the issues for determination are as follows:

**1. Whether the Preliminary Ojection is merited and therefore the matter is Res Judicata.**

The Court will first deal with the **Preliminary Objection** as it may dispose off with the Application dated **3<sup>rd</sup> May 2017** if this Court is to uphold the same. **Preliminary Objection** is described in the **Mukisa Biscuits Manufacturing Co. Ltd..Vs...West End Distributors Limited (1969) EA. 696** to mean:-

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

The 5<sup>th</sup> and 6<sup>th</sup> Defendants have averred that the Application ought to be struck off as the said Application is similar to the one filed by the Plaintiff in another suit in **Kiambu High Court**. Further that the issues that have been raised by the Plaintiff in the said Application are similar to the ones that were litigated on before **Hon. Justice Isaac Lenaola**(as he then was) in **Succession Cause No.124 of 2016**, and therefore the Application should be dismissed as it is **Res Judsicata** and an abuse of the court process.

In the case of **Charity Njanja Mwaniki (Suing on her behalf & 8 Other Siblings)...Vs...James Mwaniki Gaturu & Another [2017] eKLR**, the Court held that:-

***“In order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;***

***i. what issues were really determined in the previous case;***

***ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.***

***iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.”***

The Court has considered and reviewed the pleadings submissions and the annexures thereto. From the Application the Plaintiff has sought prayers to stop the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from drawing any maps from the illegal subdivisions. The Court particularly takes note of the term illegal subdivisions. It is not in doubt that the ***Justice Isaac Lenaola*** in his Ruling ordered for the subdivisions. It is this Court’s opinion therefore that if it were to allow the Application from the onset, it would be admitting that the subdivisions are illegal and thereby varying the Judge’s order. Being that the matter of subdivision was already litigated before a Court of competent Jurisdiction and a determination made, the Court do find that the same would be like sitting on an Appeal on the said matter.

From my perusal of the pleadings, it is clear that the Plaintiff’s concern seems to be that upon subdivision, the parties would not know which beneficiary would take which part of the suit land. This is a matter that in my opinion ought to have been litigated before the Court that ordered for the subdivision of the Estate of the deceased. A major chunk of the Application seems to be on the issue of distribution of the estate of the deceased. It is the Court’s holding that this matter was already litigated on and if this Court was to again hear and determine the issue, it would be sitting on an Appeal as against a court of equal jurisdiction.

The Court has seen the ***Certificate of Urgency*** marked as ***BW-7*** and the Plaintiffs concern seem to be that the ***Kiambu Surveyor*** would be coming to subdivide the suit property without the consent of the Administrators. This are the same issues that have been raised in this Application and though the Plaintiff has submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not parties to the other suit, this does not change the circumstances of the case as the issues are the same. See the case of ***Christopher Orina Kenyariri t/a Kenyariri 7 Associates Advocates...Vs Salama Beach Hotel Limited & 3 Others (2017)eKLR***, where the Court held that:-

***“The introduction of the 3<sup>rd</sup> Respondent as a Plaintiff in this matter does not change the design of the respondent claim.”***

***“Litigating a concluded matter under surrogates or uploading more parties to a claim does not change the conclusion already reached by the court in the former trial.”***

The principal on *res judicata* is found in ***Section 7*** of the ***Civil Procedure Act Cap 21*** which provides that:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”***

The 7<sup>th</sup> Defendant has also averred that the matter is an abuse of the court process. In the case of ***Agnes Muthoni Nyanjui & 2 Others... Vs... Annah Nyambura Kioi & 3 Others(2015)eKLR***. The Court cited the Nigerian case of ***Agwusin...Vs...Ojichie***, in which the Court held that:-

***“That abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”***

Having considered the above, it is not in dispute that that there exists ruling by the ***Justice Isaac Lenaola***, in which the said Judge ruled in the manner in which the distribution of the Estate of the deceased was to take place. But then again, when the Plaintiff was filing the instant Application, there existed another similar Application before the ***High Court in Kiambu***, wherein it was ***finally decided by the court, which matters therein were directly and substantially in issue as those in the present case***. The Plaintiff did not challenge that decision on Appeal and therefore trial of the present suit would amount to sitting on Appeal

Consequently, the Court finds the ***Preliminary Objection*** herein is merited on the basis that pursuant to ***Section 7*** of the ***Civil Procedure Act Cap 21*** the court lacks jurisdiction to deal with a matter which has already been decided by a court of competent jurisdiction. Therefore this Court proceeds to uphold the ***Preliminary Objection*** dated 3<sup>rd</sup> May 2017.

Having upheld the ***Notice of Preliminary Objection***, the Court finds the ***Notice of Motion*** application dated 3<sup>rd</sup> May 2017 not merited and the same is dismissed entirely with costs to the Respondents.

In the 2<sup>nd</sup> Application dated 31<sup>st</sup> January 2018, the issues for determination are:-

***1) Whether the Caution should be lifted.***

2) *Whether the Amended Plaintiff should be struck out.*

3) *Whether the costs of this Application and the suit should be granted to the 7<sup>th</sup> & 8<sup>th</sup> Defendants/ Applicants.*

1) *Whether the caution should be lifted.*

The lodging of a caution on any property is governed by Section 71(1) of the Land Registration Act which provides that:-

*A person who—*

*(a) Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act*

*(b) is entitled to a licence; or*

*(c) Has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the landlease or charge.*

*(2) A caution may either—*

*(a) forbid the registration of dispositions and the making of entries; or*

*(b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.*

The essence of a caution is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that another party may decide to deal with the land in ways in which are contrary to his rights. In this way the cautioner must be a person who has a legal right over the suit property. See the case of Daniel Njagi Muramiti...Vs...Peter Ndwiqa Daniel & 3 Others, where the Court held that:-

*“The law is clear that a caution can only be lodged and maintained by a person who claims a right to obtain an interest in the land, lease or charge which is capable of creation by an instrument registrable under the Land Registration Act”*

It is my opinion then that the most important question that needs to be answered is whether the cautioner has any legal interest in the suit property. It is not in dispute that the court through the findings of Lenaola J(as he then was) ordered for the sharing of the suit property equally amongst the beneficiaries of the Estate of James Muongi save that Edwin Gitau and Francis Kinyuru shall be entitled to the land where their houses stand and access thereto only. The cautioner herein is Edwin Gitau and that begs the question as to whether he has any legal interest in the suit property that is to be subdivided. It is the court's findings that the said Edwin Gitau has no claim or interest in the property that is to be divided amongst the other beneficiaries as his part had already been determined. Without a legal claim over the suit property therefore his lodging of the caution is unjustified as the order made by the Honourable Judge on 27<sup>th</sup> January 2012 has never been varied. See the case of Mumbua Ndunge Mutiso & Others...Vs...Roman Mutuku Kisin(2015) eKLR, where the Court held that:-

*“In the absence of any possible legal claim over the subject matter the existence of the caution remains unjustified.”*

Section 73 of the Land Registration Act empowers the Court to remove a caution. Consequently the court finds that the cautioner has no legal claim over the subject matter and accordingly orders for the removal of the caution

2) *Whether the Amended Plaintiff should be struck out.*

In the case of D.T Dobie & Co. Kenya Limited...Vs...Joseph Mbaria Muchina (1982)KLR 1, the Court held that:-

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

Order 2 Rule 15(1)(d) of the Civil Procedure Rules provides that;

*“At any stage of the proceeding the court may order to be struck out or amended any pleading on the ground;*

*(d) It is otherwise an abuse of the process of the court and may order the suit to be stayed, dismissed or judgment to be entered accordingly as the case may be.*

The Court has looked at the prayers sought in the Amended Plaintiff and finds that the same are similar to those that had been sought by the Plaintiff in the Application dated 3<sup>rd</sup> May 2017. As already held above the Court came to a conclusion that the said matters are res judicata and therefore this court has no jurisdiction to sit on appeal on a matter that had already been determined by a court of competent jurisdiction.

To answer the question as to whether the suit can be injected to life, this Court's answer is an emphatic **no** as the matter being *res judicata*, there is no any manner of amendment that can be able to correct it. The

Defendants have also averred that the Plaintiff had no capacity to bring the said suit without the authority of her Co-Administrator to which submissions the Court agrees with. The authority that the Plaintiff has purported to have are from some beneficiaries of whom some do not have any interest on the subject matter as they are not part of the subdivision. Without the authority of her Co-Administrator therefore she had no capacity to sue. See **Misc Civil Application No.103 B of 2013, Republic...Vs...Nairobi City Council**, where the Court held that:-

***“The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the Court. They act jointly at all times;...One administrator out of the others lacks the capacity to bind the Estate or any of the Administrators or file suit alone on behalf of the Estate.”***

The Court therefore finds that the Plaintiff lacked capacity to sue. Consequently the **Amended Plaint** dated **2<sup>nd</sup> May 2017 is struck out entirely**.

**3) Who should bear the costs.**

Costs always follow the events and in this case the Plaintiff will bear the costs. Having now carefully considered the three matters for determination, the Court finds as follows:-

***1) The Preliminary Objection dated 28<sup>th</sup> September 2017 is upheld, and the Notice of Motion dated 3<sup>rd</sup> May 2017 is found to be Res-judicata and the same is dismissed entirely with costs to the Respondents.***

***2) However, the Court orders that the caution lodged on the suit property No.Muguga/Gitaru 799 on 8<sup>th</sup> March 2013 by Edwin Gitau Kinyuru be lifted and removed as the cautioner has no legal claim over the suit property.***

***3) The Amended Plaint dated 2<sup>nd</sup> May 2017 is struck out as prayed in the Notice of Motion dated 31<sup>st</sup> January 2018.***

***4) The Plaintiff will bear the costs of the Applications and the suit.***

It is so ordered.

**Dated, Signed and Delivered at Thika this 17<sup>th</sup> day of May 2019.**

**L. GACHERU**

**JUDGE**

**17/5/2019**

In the presence of

No appearance for Plaintiffs

No appearance for Defendants

Diana - Court Assistant

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**17/5/2019**