REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

HIGH COURT SUCCESSION 560 OF 2004

IN THE ESTATE OF ABRAHIM GITAHI GATERU (DECEASED)

CYRUS KINGORI GITAHI ..... PETITIONER/APPLICANT

VERSUS

ALICE WANGARI NDUMO.....1ST RESPONDENT/1ST PROTESTOR

MARTIN NDERITU MUTERU .....2ND RESPONDENT/3RD PROTESTOR

ESTHER WANJIRU WAMBUGU .....3RD RESPONDENT

PETER NGUYO MUTERU .....4TH RESPONDENT

THE LAND REGISTRAR NYERI COUNTY .....5TH RESPONDENT

RULING

1. The applicant seeks *inter alia* leave to appeal against a Judgment delivered on 26/1/2023 by Hon. Lady Justice F. Muchemi. This was exactly 3 years ago. The application was filed on 17/11/2025. There was an earlier application dated 21/8/2024 seeking similar orders.

2. The application is made solely to get interim orders. If there are land issues as noted in the certificate of urgency, then the Supreme Court decision of **Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & Isack Ntongai M'Lintari [2015] KESC 28 (KLR)** gives guidance to the parties.

3. Regarding deeming a Notice of Appeal filed, the court has no jurisdiction to do that. The Applicant must expressly seek an extension of time and give reasons for the delay. The same has not been set out. In any case, if this were an application for leave to file an appeal out of time, then reasons ought to be given.

4. The applicant has been active in the matter throughout. The last was an application for a stay pending appeal, which I dismissed on 29/5/2025. In respect to extension of time, the **Supreme Court decision in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, gave binding guidance as follows:

> The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:
>
> a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;

b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;

c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;

d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;

e. Whether there would be any prejudice suffered by the respondents if the extension was granted;

f. Whether the application had been brought without undue delay; and;

g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

5. The question of stay or conservatory orders has been dealt with. The applicant cannot reword an application and regurgitate the same before the court. Such issues are said to be res judicata. The Supreme Court dealt with res judicata in the cases of **Dina Management Ltd vs. County Government of Mombasa and 5 others** (Petition E010 of 2021) and **John Florence Maritime Services & Another v Cabinet Secretary Transport and Infrastructure & 3 others** (Petition 17 of 2015)(2021) KESC 39 (KLR) (Civ) August 2021.

6. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to

those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of **Henderson v Henderson** (1843-60) All E.R 378, observed thus:

> "…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

7. Res judicata applies to applications just like suits. In the case of **Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR** the court stated thus:

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was *resjudicata* and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

8. Further, in the case of **Maumbwa & 3 others v Kisemei** (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is *res judicata*. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been

tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

9. The advocate addressed the court. The court pointed out the existence of another application dated 21/8/2024. The applicant was unable to accept that leave to appeal must be filed within 14 days of the decision. This application was filed long after the time, as was the application dated 21/8/2024. Rule 41 of the Court of Appeal Rules provides as follows:

> (1) In a civil matter-
> (a) where an appeal lies with the leave of the superior court, application for such leave may be made-
> (i) informally at the time when the decision against which it is desired to appeal is given;
> or
> (ii) by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;

10. This decision is not concerned with whether leave to appeal is required; that question is reserved for another day. The issue before the Court is the competence of an application seeking leave to appeal nearly three years after the decision was made. There is no merit in the said application, which I hereby dismiss.

11. The only other issue remaining is the application seeking leave for the firm of M/s Gitahi Muchiri & Company Advocates to come on record, in lieu of the former advocates. The said application is not opposed and is therefore granted. However, the same is granted on the condition that the applicant serves a notice of change of advocates on the previous advocates on record and the Respondent within 7 days; failure to do so results in the orders lapsing.

12. The net effect is that, save for leave for the firm of M/s Gitahi Muchiri & Co. Advocates to come on record, the rest of the application is unmerited and is accordingly dismissed.

13. There were no documents filed in opposition. Consequently, each party shall bear its own costs.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **26th** day of **January, 2026**. Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Gitahi for the Applicant.

Applicant present.

Court Assistant – Michael