



REPUBLIC OF KENYA



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**Kithaka v Wangari & 3 others (Civil Appeal 155 of 2020)
[2026] KECA 255 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 255 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 155 OF 2020
K M'INOTI, S OLE KANTAI & A ALI-ARONI, JJA
FEBRUARY 13, 2026**

BETWEEN

JAMES KARIUKI KITHAKA APPELLANT

AND

**TERESIA WANGARI ALIAS TERESIA WANGARI GITHAKA 1ST
RESPONDENT**

PRINCIPAL MAGISTRATE'S COURT, WANG'URU 2ND RESPONDENT

NATIONAL IRRIGATION BOARD 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(Appeal from the judgment and decree of the Environment & Land Court at
Kerugoya (Cherono, J.) dated 11th October 2019 in Const. Pet. No. 4 of 2017)*

JUDGMENT

1. This appeal arises from the judgment of the Environment & Land Court (ELC) at Kerugoya, (Cherono, J.), dated 11th October 2019, by which the ELC dismissed a constitutional petition by the appellant, James Kariuki Kithaka, alleging violation of his right to property. The judgment was the culmination of a dispute that commenced in 2001. The convoluted history of that litigation is aptly summarised by the learned judge in the following sentence:

“...this petition holds the dubious distinction of having been heard as a succession cause, a land dispute before the Land Disputes Tribunal, the Provincial Land Appeals Committee, the High Court and now the Environment and Land Court.”

2. The dispute pits the appellant against his step-mother, Teresia Wangari Githaka (1st respondent), and revolves around the ownership of the plot of land known as “Rice- Holding No. 2462 Thiba



Section” (the suit property), measuring approximately four acres, which was initially allocated to the appellant’s father, John Githaka Ithika, as a licensee of the Mwea Irrigation Settlement Scheme. The appellant pleaded that his father made him his nominee as regards the plot, and upon the demise of the father, the Wang’uru District Magistrate’s Court directed, in Succession Cause No. 30 of 2001, that the suit property be registered in his name to hold the same in trust for his mother and his siblings.

3. The appellant further pleaded that in 2002, the 1st respondent lodged a claim in the Mwea Land Disputes Tribunal and was awarded 2 acres of the suit property. Aggrieved by the decision, the appellant lodged an appeal before the Central Province Land Disputes Appeals Committee, which awarded him the rice field while the 1st respondent was awarded only the plot that she was using at the time. The decision of the Appeals Committee was adopted as an order of the Court in Arbitration Cause No. 28 of 2002.
4. The appellant was aggrieved by the award to the 1st respondent and appealed in Embu High Court Civil Appeal No. 27 of 2003, which appeal was however, dismissed on 20th September 2007.
5. In the meantime, on 23rd March 2003, the 1st respondent applied before the Principal Magistrate’s Court in Wang’uru in the Succession Cause we have already referred to, and was awarded 2 acres of the suit property. Determined that the 1st respondent should not have a share of the suit property at any cost, the appellant filed in the Senior Resident Magistrate’s Court at Kerugoya, Case No. 178 of 2008, seeking an injunction to stop the 1st respondent from interfering with the suit property. The suit was struck off for want of jurisdiction and the appellant filed Embu High Court Civil Appeal No. 89 of 2008, which was dismissed with costs.
6. Subsequently, the Principal Magistrate’s Court at Wang’uru, restored the decision of the Provincial Appeals Committee which recognised the appellant as the person entitled to the suit property. Applications later filed by both the appellant and the 1st respondent were dismissed, leading ultimately to the appellant filing a constitutional petition in the ELC challenging the continued occupation of 2 acres of the suit property by the 1st respondent and alleging violation of his constitutional rights and freedoms.
7. By way of reliefs, the appellant prayed for declarations that his right to property under Article 40, his right to fair administrative action under Article 47, his right to access justice under Article 48, and his right to a fair trial under Article 50 of *the Constitution* were violated by the respondents; declarations that the decisions of the Mwea Land Disputes Tribunal and the Provincial Appeals Committee were unconstitutional, null and void, an order for eviction of the 1st respondent from the suit property, damages and costs.
8. Opposing the petition, the 1st respondent pleaded that the suit property was the property of the National Irrigation Board (the Board), and that the appellant and herself were mere licensees; that the appellant had no right to evict other members of the family from the suit property; that the appellant obtained the order to hold the suit property through irregular and secret succession proceedings; that the issues raised in the petition were res judicata; and that the petition was a disguised appeal.
9. It appears from the record that the other respondents neither responded to the petition nor participated in its hearing. The ELC framed three issues for determination, namely, whether the appellant’s constitutional rights and freedoms had been violated; whether the dispute was res judicata, and which party should bear the costs.
10. After considering the matter, the ELC found, as regards the first issue, that the suit property belonged to the Board in Mwea Irrigation Settlement Scheme; that the appellant and the 1st respondent were only licensees of the Board and not the absolute owners of the suit property; that being only a



- licensee, the appellant's constitutional right to property had not been violated; and that the appellant, having availed himself other available legal remedies could not subsequently allege violation of his constitutional right to property.
11. On the second issue, the Court found that the constitutional petition was res judicata and as regards costs, he ordered the appellant to pay the costs. The appellant was aggrieved and lodged this appeal, faulting the ELC on two grounds, in which he contended that the trial court erred by:
 - i. failing to hold that the appellant's tenancy rights were protected under Article 40 of *the Constitution*; and
 - ii. holding that the petition was res judicata.
 12. At the hearing of the appeal on the virtual platform, both the appellant and the 1st respondent elected to rely on their written submissions without highlighting the same. The other respondents neither filed submissions nor appeared during the hearing.
 13. In support of the appeal, the appellant, represented by Ms. Muturi, learned counsel, conceded that the suit property is owned by the Board in the Mwea Irrigation Settlement and was governed by the *Irrigation Act*, Cap 347, Laws of Kenya (repealed). However, it was submitted that by virtue of Article 40 of *the Constitution*, the appellant was guaranteed the right to own property and that his deceased father having made the appellant his nominee and the subordinate court having transferred the suit property to him in a succession cause, the same was protected property under *the Constitution*. Counsel contended that a leasehold tenure like the one held by the appellant is recognised property under Article 64(b) of *the Constitution* and section 7(1) of the *Land Act*, and that the ELC therefore erred in holding that the suit property was not protected under *the Constitution*.
 14. As regards the second issue on res judicata, counsel submitted that the constitutional petition from which this appeal arises was different from the earlier cases between the parties over the suit property. Emphasis was placed on the reliefs that the appellant had sought in the petition, which counsel submitted were different from those in the earlier suits and applications. She concluded by submitting that the issues raised in the petition had never been determined in the former suits.
 15. Opposing the appeal, Ms. Thungu, learned counsel for the 1st respondent, submitted that a constitutional petition is a special jurisdiction to be deployed only in appropriate cases rather than in each and every alleged breach of a right guaranteed by *the Constitution*. It was contended that the appellant did not hold any property rights over the suit property, which belongs to the Board. On the contrary, what the appellant held was only a tenant card as a licensee, which did not constitute the suit property his private property, or make him its owner. It was further contended that the Board merely issues licences to people to occupy and work on rice holdings, thus constituting them as licensees, rather than owners of the rice holdings.
 16. The 1st respondent further submitted that it was a misnomer for the appellant to contend that possession of a tenant card as a licensee gave him absolute and indefeasible title under the *Irrigation Act* capable of protection under Article 40 of *the Constitution*. It was contended that being a mere licence, the right of occupation could be taken away under the Irrigation (National Irrigation Scheme) Regulations and further, that the suit property did not constitute private property of the appellant's father capable of being distributed upon his death as part of his estate.
 17. As regards the issue of res judicata, it was submitted that the petition was indeed res judicata because the issues therein were directly or substantially in issue in the former suits; the former suits were between the same parties in the petition or persons under whom they claimed; and that the issues were heard and determined by courts of competent jurisdiction. The 1st respondent relied on the decision of this Court



in *Uhuru Highway Development Ltd v. Central Bank of Kenya* [1999] eKLR and *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, regarding the considerations that the court takes into account in determining whether or not a suit is *res judicata*.

18. For the above reasons, the 1st respondent urged us to dismiss the appeal with costs.
19. We have carefully considered this appeal, the judgment of the ELC and the submissions by the parties. We shall address the two issues for determination as raised by the appellant.
20. On the first issue as to whether the appellant had any property in the suit property capable of being protected by *the Constitution*, it is common ground between the parties that the suit property is vested in the Board and that the appellant is a licensee of the Board, rather than the owner of the suit property. However, that in and of itself is not the decisive factor in determining whether he had constitutionally protected rights in the suit property. That issue must depend on the terms of the *Irrigation Act*, because the appellant is a statutory licensee rather than the holder of a bare licence.
21. Megarry's Manual of the Law of Real Property (6th Edn., 1982) defines a licence as follows, at page 370:

“Traditionally, a licence is permission given by the occupier of land which, without creating any interest in land, allows the licensee to do some act which would otherwise be a trespass... Unlike a lease or tenancy, a licence need not, and usually does not confer a right to the exclusive possession of the land concerned.”
22. At the lowest end of the spectrum of licences is the bare licence the characteristics of which are explained as follows in the same Manual:

“A bare licence is a licence granted otherwise than for valuable consideration, such as gratuitous permission to enter a field to see the view. Even if granted by deed, the licensor can revoke it at any time, on giving reasonable notice, without being liable in damages...A bare licence binds neither the licensor nor any third party.”
23. There is however a contractual licence which is created by contract. If construction of the contract indicates that it was the intention of the parties to create an irrevocable licence for a period, any revocation by the licensor in breach of contract may be restrained by injunction or specific performance may be ordered.
24. As we have already indicated, the licence in issue in this appeal is created by statute. At the material time, the *Irrigation Act*, Cap 347 Laws of Kenya regulated the relationship between the appellant and the Board. That Act was repealed and replaced by the *Irrigation Act*, No. 4 of 2019, which came into force on 16th August 2019.
25. Section 3 of the repealed Act established the Board as a body corporate with perpetual succession, common seal, power to sue and be sued, and power to own and dispose of property. Section 14 of the Act empowered the Minister, by notice in the gazette, to designate land as a national irrigation scheme and to vest such land in the Board. The Board was responsible for the development and control of national irrigation schemes and had power to coordinate and plan settlement on national irrigation schemes. Pursuant to Legal Notice No 67 of 1977, Mwea/Tebere Irrigation Area is one of the designated national irrigation schemes in Kenya.
26. Section 27 of the Act empowered the Minister in consultation with the Board to make regulations for the better carrying out of the provisions and purposes of the Act, and in the exercise of that power, the Minister made the Irrigation (National Irrigation Schemes) Regulations, 1977. By dint of regulation



4, to reside, carry on business or occupy any part of an irrigation scheme, a person had to have a license from the Board. The licence specified the particular holding to be occupied, the period it was to be occupied, and the livestock that could be kept thereon. Regulation 25 provided as follows regarding the period of the licence:

- “25. Subject to the provisions of regulations 7, 8, 11 and 22, every licence shall be valid for a period of one year and from year to year thereafter, but may be terminated at any time—
- i. by the licensee giving to the manager six months notice in writing of his intention to surrender his licence;
 - ii. by the manager, on instruction of the Minister, giving to the licensee 12 months’ notice in writing of his intention to terminate the licence.”

27. Accordingly, after the first year, the licence continued on year-to-year basis unless it was terminated in accordance with the provisions of the regulations. In other words, so long as the person who held the licence complied with the conditions stipulated in the regulations, he or she was assured of utilising the rice-holding from year to year, unless the Minister terminated the licence on notice in accordance with the regulations. The evidence on record does not show that the licence in this case was ever terminated and therefore it continues today.

28. It is also important to refer to the provisions of the regulations regarding the death of a licensee. Regulation 7 required the licensee to nominate in writing, a person to succeed him in the event of his death, and failure to do so led to the termination of the licence. Where a nomination had been made, the licence continued beyond the life of the original holder. It is under this regulation that the appellant contends that the deceased appointed him his nominee.

29. Taking the above provisions of the statute into account, was the trial court right in holding that the appellant, being a licensee, had no property rights in the suit property protected under *the Constitution*? Article 40 of *the Constitution*, which protects the right to property, provides as follows:

“40.

- (1) Subject to Article 65 (landholding by non-citizens), every person has the right, either individually or in association with others, to acquire and own property -
 - a. of any description; and
 - b. In any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person -
 - a. to arbitrarily deprive a person of property of any description or of any interest in or, right over, any property of any description; or
 - b. To limit, or in any way restrict the enjoyment of any right under this Article on the basis of the grounds specified or contemplated in Article 27(4) (discrimination).



3. The State shall not deprive a person of property of any description, or any interest in, or right over, property of any description, unless the deprivation -
 - a. results an acquisition of land or interest in land or conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or the public interest and is carried out in accordance with this Constitution and any Act of Parliament that -
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.

....”

30. A reading of the above provision leaves no doubt that *the Constitution* protects property or a right or interest in property in the broadest terms possible so as to extend to “property of any description”. It is erroneous to suggest, as the learned judge does, that the only property protected by *the Constitution* is absolute property. For a Constitution that is transformative and rooted in the quest for social justice, such an interpretation is not only contrary to the black letter of *the Constitution*, but also its spirit. A licensee of a rice- holding in Mwea, who is within the terms of the *Irrigation Act*, enjoys the same constitutional protection as the property owner in Muthaiga. As long as the licensee is observing the terms of the statute under which the license is granted, he or she is assured of the right of enjoyment of the rice-holding from year to year, and that right cannot be taken away arbitrarily because it is not a bare licence. Such property enjoys constitutional protection.
31. To say that the appellant’s rights in the rice-holding enjoyed constitutional protection is not synonymous with saying that, in the circumstances of this appeal, his right to property was violated. As we have pointed out, before resorting to the constitutional petition, the dispute between the appellant and the 1st respondent was litigated before several legally established fora, which rendered decisions and determinations. There would be no basis in the circumstances of this case to hold that the appellant had been deprived of his right to the rice-holding “arbitrarily”. To that extent, we would agree with the respondent that the appellant did not prove violation of his right to property under Article 40 of *the Constitution* in so far as he was aggrieved by decisions and determinations of lawfully constituted dispute resolution tribunals and mechanisms.
32. This brings us to the second issue, namely whether the appellant’s petition was res judicata. Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata in the following terms:

“7. Res judicata

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...”

33. That provision prohibits the court, in absolute terms, from entertaining a suit that raises issues already heard and finally determined by a court of competent jurisdiction in an earlier suit between the same parties or parties claiming under them. As has been stated time without number, the doctrine of res judicata rests on the salutary principles that litigation must come to an end, and that the court cannot be asked to determine the same issue over and over.
34. In *Kenya Commercial Bank Ltd v. Muiiri Coffee Estate & Another* [2016] eKLR, the Supreme Court explained as follows regarding the doctrine of res judicata:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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.”

(See also *John Florence Maritime Services Ltd & another*

- v. *v. Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR and *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR).

35. This Court considered the elements of res judicata in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR, and held as follows:

“...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. the suit or issue was directly and substantially in issue in the former suit;
- b. that former suit was between the same parties or parties under whom they or any of them claim;
- c. those parties were litigating under the same title;
- d. the issue was heard and finally determined in the former suit; and
- e. the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised .”

(See also *Uhuru Highway Development Ltd v. Central Bank of Kenya* [1999] eKLR and *Bernard Mugo Ndungu v. James Nderitu Githae & 2 Others* [2010] eKLR).



36. We also bear in mind that the doctrine of res judicata applies not only to the issues raised in the earlier suit or suits, but also to all issues which, by reasonable diligence, the parties ought to have raised in that first suit. Parties are required to bring forward their entire claims in the earlier suit rather than to litigate the issues in instalments. Accordingly, if, from the nature of the case, an issue ought to have been raised in the first suit but due to accident, inadvertence or negligence it was not raised, the court will not allow it to be raised subsequently. (See *Henderson v. Henderson* [1843] 67 ER 313).
37. In addition, parties are not allowed to evade the doctrine of res judicata by adding new parties or introducing a new cause of action so as to seek the same remedy as that sought in the first suit. In *Kenya Commercial Bank Ltd v. Muiri Coffee Estate & Another* (supra), the Supreme Court stated:
- “59...Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle... The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”
38. As explained by the Supreme Court in *Kenya Commercial Bank Ltd v. Muiri Coffee Estate & Another* (supra), the doctrine of res judicata applies even in constitutional issues. In this appeal, we have set out in detail a multiplicity of suits and actions in various fora and courts between the appellant and the 1st respondent over the suit property. The dispute has been determined as well as the appeals and applications arising from those determinations. The constitutional petition from which this appeal arose was clearly res judicata as held by the ELC, and was barred in absolute terms by section 7 of the *Civil Procedure Act*. It does not avail the appellant to argue that the petition was seeking different remedies from the earlier suits.
39. Ultimately, we come to the conclusion that save for the finding by the trial court that the appellant had no property rights in the suit property capable of protection by *the Constitution*, this appeal has no merit and is hereby dismissed. The appellant, having partially succeeded in the appeal, we direct each party to bear their own costs. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 13TH DAY OF FEBRUARY, 2026.

K. M'INOTI

..... **JUDGE OF APPEAL**

S. ole KANTAI

..... **JUDGE OF APPEAL**

A. ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

