



**Mwikali & another v Mutungi & 3 others (Civil Appeal 189 of 2019)  
[2026] KECA 231 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 231 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 189 OF 2019  
PO KIAGE & K M'INOTI, JJA  
FEBRUARY 13, 2026**

**BETWEEN**

**FLORENCE NDUNGE MWIKALI ..... 1<sup>ST</sup> APPELLANT**

**JENNIFER MWONGELI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGNES MWIKALI MUTUNGI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY REGISTRAR, MAKUENI ..... 2<sup>ND</sup> RESPONDENT**

**LAND ADJUDICATION OFFICER, MAKUENI ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the ruling and order of the Environment & Land Court at  
Makueni (Mbogo, J.) dated 22nd February 2019 in ELCC No. 358 of 2017)*

**JUDGMENT**

1. On 22<sup>nd</sup> February 2019, the Environment and Land Court (ELC) at Makueni, (Mbogo, J.) struck out with costs a suit filed by the appellants against the respondents, because it was barred by the doctrine of res judicata. The ELC found that the issues raised in the suit were directly or substantially in issue in two consolidated suits which were heard and finally determined by the High Court, to wit, Nairobi High Court Civil Cases Nos. 679 of 1980 and 726 of 1980. The court also found that those suits were between the same parties or parties under whom the appellants and the respondents were litigating.
2. The appellants were aggrieved and lodged a notice of appeal on 5<sup>th</sup> March 2019 followed by a memorandum of appeal containing a whopping 27 grounds of appeal, which are not only repetitive but utterly irrelevant to the central issue determined by the ELC. Indeed, at the hearing of the appeal, Mr. Mutinda, learned counsel for the appellants, addressed the court only on the single relevant ground of appeal, namely, whether the ELC erred by holding that the appellants' suit was res judicata.



3. This Court has had occasion to draw attention of counsel to the provisions of rule 88(1) of the Court of Appeal Rules which demands that the memorandum of appeal must be drawn concisely, setting forth under distinct heads and without argument or narrative, the grounds upon which the appellant challenges the judgment in question. The Court has also noted that a surfeit of irrelevant or repetitive grounds of appeal does nothing to enhance the prospects of an appeal.
4. In *Nasra Ibrahim Ibren v. IEBC & 2 Others* [2018] KECA 500 (KLR), the Court cautioned as follows:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric. As this Court noted in *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR, a surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.”
5. Yet again in *Robinson Kiplagat Tuwei v. Felix Kipchoge Limo Lagat* [2020] eKLR the Court reiterated:

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal.”
6. We hope that in future Mr. Mutinda, or whoever it was that drew the memorandum of appeal now before us, will take heed.
7. The brief background to the appeal is as follows. On 23<sup>rd</sup> November 2017, the appellants filed a suit in the ELC against the respondents regarding the properties known as Kilungu/Kivani/272 and Kilungu/Kivani/274 which were amalgamated into Makueni/Kivani/1474 (the suit property). We shall refer to the suit filed in the ELC as the second suit).
8. The appellants pleaded that the land parcels Nos. Kilungu/Kivani/272 and Kilungu/Kivani/274 belonged to Solomon Mulili Mutyambui (deceased) (hereafter Mutyambui) and that they were illegally and fraudulently amalgamated and transferred, first, to Philip Mutuku Mutungi (deceased) (hereafter Mutungi), and subsequently to his wife, the 1<sup>st</sup> respondent, Agnes Mwikali Mutungi (hereafter Agnes). The particulars of the alleged fraud were pleaded and the appellants prayed for various reliefs, among them a declaration that the amalgamation of the two parcels and their transfer to Agnes was fraudulent, null and void; a declaration that the beneficiaries of the estate of Mutyambui were the rightful owners of the suit property by adverse possession; an order for cancellation of Agnes’s registration and in lieu thereof registration of the parcels in the name of Mutyambui; a permanent injunction to restrain the Agnes from entering or selling the suit property; and costs of the suit.
9. The Agnes filed a defence dated 13<sup>th</sup> December 2017 in which she denied the appellants’ averments and the particulars of fraud. She averred instead that the suit property was not part of the estate of Mutyambui, the latter having sold the same to her late husband, Mutungi. She also pleaded that the suit property was lawfully transferred to her following succession proceedings.



10. Agnes also raised a preliminary objection dated 11<sup>th</sup> December 2017 to the suit and an interlocutory application filed by the appellants for prohibitory and mandatory injunctions. As far as is relevant to this appeal, Agnes contended that the appellants' suit was res judicata, the issues raised therein having been directly and substantially in issue Civil Cases Nos. 679 of 1980 and 726 of 1980 (consolidated), where judgment was entered against the 1st appellant, Florence Ndunge Mulili (Florence), by Akiwumi, J. (as he then was), on 17<sup>th</sup> August 1990. We shall refer to the consolidated suits as the first suit.
11. From the record, the other respondents did not respond to the suit.
12. As we have already stated, after hearing the matter, the ELC sustained the preliminary objection and struck off the appellants' suit with costs, resulting in this appeal.
13. Although aware of the directions given by the Court to file written submissions, which instructions were repeated in the hearing notice dated 7<sup>th</sup> October 2024, none of the parties complied with the directions. Indeed, other than counsel for the appellants, the other parties did not appear for the hearing on 28<sup>th</sup> October 2024.
14. At the hearing of the appeal, Mr. Mutinda for the appellants unsuccessfully applied for adjournment of the hearing of the appeal. However, the Court allowed him to make oral submissions in support of the appeal.
15. In support thereof counsel submitted that the ELC erred by prematurely striking out the suit based on a preliminary objection and that the court ought to have heard and determined the second suit on merit. He contended that the second suit was not res judicata because it raised new issues and that the judgment in the first suit did not address the question of amalgamation of the two parcels of land, which was raised in the second suit. It was also submitted that the first suit did not address the issue of adverse possession or the fraudulent amalgamation and transfer of the suit property.
16. In the appellants' view, the second suit raised new issues that deserved to be heard on merit. They also submitted that the parties in the first suit were different from the parties in the second suit and that the ELC erred by striking out the suit prematurely. For those reasons, the appellants urged the Court to allow the appeal so that the dispute can be determined on merit.
17. We have carefully considered this appeal. The doctrine of res judicata is provided for in section 7 of the *Civil Procedure Act*, as follows:

“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...”
18. Section 7 prohibits the court, in absolute terms, from hearing a suit which raises issues that have already been heard and finally determined by a court of competent jurisdiction in an earlier suit between the same parties or parties claiming under them. The rationale behind the doctrine of res judicata rests on the principles that litigation must come to an end, and that the court cannot be asked to determine the same issue over and over.



19. In *John Florence Maritime Services Ltd & Another v. Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, this Court held as follows on the doctrine:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

(See also *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR).

20. Subsequently, in *Kenya Commercial Bank Ltd v. Muiri Coffee Estate & Onother* [2016] eKLR the Supreme Court explained that:

“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.”

21. There are two other important principles to bear in mind as regards the doctrine of res judicata, which are relevant to this appeal. The first is that the doctrine applies not only to the issues raised in the first suit, but also to all issues which, by reasonable diligence, the parties ought to have raised in that first suit. Accordingly, parties are required to bring forward their entire claims in the first suit rather than to litigate the issues in instalments. Thus, 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. In *Henderson v. Henderson* [1843] 67 ER 313, Wigram VC held as follows on the principle:

“...where a given matter becomes the subject of litigation in, and 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 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 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” (Emphasis added).



22. The second principle is that parties will not be permitted 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.” (Authorities and quotations omitted).”

(See also *E. T. v. Attorney General & another* [2012] eKLR, *Omondi v. National Bank of Kenya Ltd & 2 Others* [2001] EA 177, and *Njangu v. Wambugu*, HCCC No. 2340 of 1991).

23. Regarding the elements of res judicata, in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR, this Court identified the following elements of the doctrine:

“...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).

24. Taking into account the above principles and applying them to the appeal at hand, we note that it is common ground that the first suit was heard and finally determined on 17<sup>th</sup> August 1990 by the High Court, a court of competent jurisdiction.

25. The parties to the first suit were Mutyambui and Mutungi as plaintiffs, against Florence who was the 1st defendant and then referred to as Florence Ndunge Mwikali. The second defendant in the first suit was Florence’s brother, Mutisya. Florence and Mutisya are children of Mutyambui. The first suit involved the ownership of Plot Nos. Kilungu/Kivani/272 and Kilungu/Kivani/274. In that suit Mutyambui pleaded that Florence had fraudulently registered Plot No. Kilungu/Kivani/274 in her name while Mutisya had fraudulently registered Plot No. Kilungu/Kivani/272 jointly in his name and that of Mutyambui. He prayed for a declaration that the two plots belonged to him alone and absolutely and that he was entitled to sell and transfer them to Mutungi.

26. The High Court identified the central issue in the dispute to be whether Mutyambui had given Plot Nos. 274 and 272 to Florence and Mutisya. The court held that Mutyambui had distributed



his property to the houses of his three wives and had not transferred the suit properties to Florence or Mutisya. Accordingly, the court issued a declaration that the two plots belonged absolutely to Mutyambui and that he was free to transfer them to Mutungi. From the record, there was no appeal from the judgment of the High Court.

27. In the second suit, the parties were Florence and her sister Jennifer Mwongeli, as plaintiffs. Jennifer, who was not a party to the first suit, appears to have replaced Florence's brother, Mutisya in the second suit. The main defendant in the second suit was Agnes Mwikali Mutungi, the widow of Mutungi, who was the 2<sup>nd</sup> plaintiff in the first suit. As we have already stated, the dispute in the second suit still relates to the ownership of the same two plots which the High Court found to belong absolutely to Mutyambui, who the court held was free to sell and transfer them to Mutungi as he deemed fit.
28. In the second suit the appellants were still challenging the sale and transfer of the sale properties by Mutyambui to Mutungi, an issue which was finally and conclusively settled by the judgment of the High Court dated 17<sup>th</sup> August 1990, against which the appellants did not appeal. The appellants have merely added additional parties, namely Jennifer Mwongeli as a co-plaintiff and co-appellant; and the County Registrar, Makueni; the Land Adjudication Officer, Makueni; and the Attorney General as defendants/respondents. They have also devised a new cause of action based on adverse possession and amalgamation of the two plots.
29. Like the ELC, we are satisfied that the addition of new parties and causes of action is nothing short of a poorly contrived stratagem to defeat the doctrine of res judicata, which the courts have consistently warned against. The central question in the second suit, which was resolved by the High Court in the first suit, remains whether the suit property belonged to Mutyambui and whether he had the right to sell the same to Mutungi. That issue is plainly and simply settled and closed, and is therefore res judicata.
30. We must also note that Florence was a major party in the first suit as the first defendant and in the second suit as the first plaintiff. In the second suit she purports to be litigating under the title of Mutyambui as an administrator of his estate. In the second suit, the first defendant, Agnes, is the widow of Mutungi, who was the second plaintiff in the first suit. She is also litigating under the title of her late husband, Mutungi.
31. The appellants' contention that the ELC erred by striking out as the suit as res judicata instead of hearing it on merits is perilously near saying that the doctrine of res judicata is no more than a procedural technicality, which the court can waive. Nothing is further from the truth. In *Kenya Commercial Bank Ltd v. Muiiri Coffee Estate & Another* (supra), the Supreme Court emphasised that res judicata is a doctrine of substantive rather than procedural law. Accordingly, if a suit is res judicata, the court has no discretion to hear it on merits. Section 7 of the *Civil Procedure Act* unequivocally bars the court from hearing such a suit. A party cannot invoke Article 159 (2) (d) of *the Constitution* which requires courts to determine disputes without undue regard to technicalities, so as to defeat the doctrine of res judicata.
32. For the foregoing reasons, the appellants' appeal is totally bereft of merit and the same is hereby dismissed in its entirety. As none of the respondents appeared to defend the appeal, we make no orders on costs. It is so ordered.
33. This judgment is delivered pursuant to rule 34(4) of the Court of Appeal Rules, in light of the demise of the Hon. Mr. Justice F. A. Ochieng, JA.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY 2026**

**P. O. KIAGE**



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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

