

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC CASE NO. E032 OF 2024**

**DICKSON MACHARIA GICHUHI.....**  
**PLAINTIFF**

**VERSUS**

**MOSES NDUNG’U MUNGAI..... 1<sup>ST</sup>**  
**DEFENDANT**

**LAND REGISTRAR, MBEERE SOUTH.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

Through the application dated 5/3/2025, the 1<sup>st</sup> Defendant sought to have this suit struck out for being res judicata on the basis that the matters in issue were heard and determined in Kerugoya ELC Case No. 70 of 2017 and Nyeri Civil Appeals No. 89 and 90 of 2022 by the Court of Appeal. The application was made on the grounds that the subject matter of this case is ownership of the land known as Mbeere/Wachooro/1617 (the suit property). The suit property was the subject matter in Kerugoya ELC Case No. 70 of 2017 filed by Tebere Concrete Company Limited, which the Court of Appeal determined that it belonged to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that the parties in this case were also parties in Kerugoya ELC Case No. 70 of 2017 and Nyeri Civil Appeal Numbers 89 and 90 of 2022.

The 1<sup>st</sup> Defendant swore the affidavit in support of the application. He deponed that he was the proprietor of the suit land which he purchased from the Plaintiff vide the sale agreement dated 7/10/2015. He annexed a copy of the sale agreement together with the title deed issued to him on 25/1/2019. Prior to that, the Plaintiff had sold the suit property to Tebere Concrete Company Limited. The Plaintiff rescinded the sale after Tebere Concrete Company limited breached the contract. The company sued the Plaintiff claiming the suit property and the 1<sup>st</sup> Defendant was added as a party to that suit. The case was heard and determined by the ELC Court, which found that Tebere Concrete Company was to pay the balance of the consideration to the Plaintiff.

Aggrieved by the decision of the ELC, the Plaintiff and the 1<sup>st</sup> Defendant filed Civil Appeals Numbers 89 and 90 of 2022 at the Court of Appeal in Nyeri. The appeals were consolidated and vide the judgment dated 25/10/2024, the Court of Appeal found that the suit property belonged to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant exhibited copies of the pleadings, witness statements and decisions emanating from the ELC and Court of Appeal.

The 1<sup>st</sup> Defendant pointed out that the Plaintiff admitted in his witness statement dated 2/9/2020 and during the hearing before the ELC that the suit land belonged to the 1<sup>st</sup> Defendant and that he had no claim against the 1<sup>st</sup> Defendant. That if the Plaintiff had any claim against him with regard to the suit property, he would have raised that issue in ELC Case No. 70 of 2017 and the appeals

that arose from the decision of the ELC. He deponed that the parties in this case are the same as the parties in ELC Case No. 70 of 2017 save for Tebere Concrete Company Limited, which is not a party in this case. He urged that ELC Case No. 70 of 2017 and Nyeri Civil Appeal No. 89 and 90 of 2022 were heard and determined by courts of competent jurisdiction.

The Plaintiff swore the replying affidavit in opposition to the application seeking to struck out his suit. He averred that he was still the registered owner of the suit property and relied on the copy of the title deed issued on 18/4/2017. He averred that pursuant to the sale agreement dated 7/10/2015, he sold the suit property to the 1<sup>st</sup> Defendant at a cost of Kshs. 18,500,000/= and was paid Kshs. 3,700,000/= leaving a balance of Kshs. 14,800,000/= which he claimed has never been paid to date. That pursuant to the sale agreement, he deposited the original title with Kahuthu and Kahuthu Advocates in 2017. However, the 1<sup>st</sup> Defendant picked the title on 21/12/2018 and fraudulently transferred it to his name. He claimed that the title issued by the 2<sup>nd</sup> Defendant on 25/1/2019 was fraudulently obtained because he did not obtain consent to transfer the land, and that he did not execute the transfer and the application for Land Control Board Consent (LCB) consent. He claimed that he lodged a complaint at the Makutano Police Station vide OB/NO.10/23/12/24 and that proceedings were commenced against the 1<sup>st</sup> Defendant in Wang'uru Principal Magistrate Court Misc. Criminal Application No. E007 of 2025.

The Plaintiff maintained that the dispute between him and the 1<sup>st</sup> Defendant was not in issue before the various courts. He relied on the plaint, amended defence and counterclaim filed in ELC No. 70 of 2017. He also pointed out that Tebere Concrete Company Limited was not a party in this case.

Margaret M. Mutai, the Deputy Chief Land Registration Officer stationed at Kiritiri Land Registry swore the Replying Affidavit on behalf of the 2<sup>nd</sup> Defendant in response to the 1<sup>st</sup> Defendant's application. She deponed that the suit property was registered in the 1<sup>st</sup> Defendant's name as evidenced by the copy of the land registrar which shows that the title was issued on 25/1/2019. She denied that **the Plaintiff became aware of the registration of the 1<sup>st</sup> Defendant in 2024**. She adverted to the Plaintiff's statement before the Court of Appeal, where he admitted that he sold the suit property to the 1<sup>st</sup> Defendant on 7/10/2015 and that the 1<sup>st</sup> Defendant complied with all statutory requirements resulting in the issuance of a title on 25/1/2019. She pointed out that the Plaintiff did not raise any objection to the transaction involving the 1<sup>st</sup> Defendant who claimed to have lawfully purchased the suit property from him. She mentioned that the appellate court expressly stated in its judgment that the suit property was registered in the 1<sup>st</sup> Defendant's name under Sections 24, 25 and 26 of the Land Registration Act. Further, that the title issued to the 1<sup>st</sup> Defendant had not been cancelled or revoked and therefore remained valid and protected. Additionally, that during

cross examination, the Plaintiff confirmed that the transaction was neither fraudulent nor tainted with corruption.

The application was canvassed through written submissions. The 1<sup>st</sup> Defendant submitted that this suit is *res judicata* as the main issue is similar to what was heard and determined in Kerugoya ELC Case No. 70 of 2017 and Nyeri Civil Appeals No. 89 and 90 of 2022. The 1<sup>st</sup> Defendant relied on Section 7 of the Civil Procedure Act on the prerequisites of the doctrine of *res judicata*, which are, that the matter directly and substantially in issue in the former suit must be the same as that in the subsequent suit and the parties in the former and subsequent suits must be the same. The matter must have been heard and finally decided by a court of competent jurisdiction. The 1<sup>st</sup> Defendant submitted that *res judicata* serves the public policy objectives that there must be an end to litigation and a person should not be vexed twice over the same subject matter. He relied on the decision in **Independent Electoral and Boundary Commission v Maina Kiai and 5 Others [2017] eKLR**, which addressed the issue of *res judicata*. He urged the court to dismiss the suit and award him costs.

The 2<sup>nd</sup> Defendant submitted that despite a final pronouncement by the Court of Appeal, the Plaintiff instituted the present suit seeking to relitigate ownership of the suit property yet he was a party in the Kerugoya ELC Case and the Civil Appeals before the Court of Appeal at Nyeri. The 2<sup>nd</sup> Defendant concurred with the 1<sup>st</sup> Defendant **that the issue of ownership of the suit property was**

conclusively heard and determined before the ELC and Court of Appeal.

It was submitted that once the Court of Appeal affirmed ownership of the suit property at paragraph 33 of its judgment, the question of title stands settled and cannot be reopened. The 2<sup>nd</sup> Defendant also cited Section 7 of the Civil Procedure Act which bars a court from trying 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 before a court of competent jurisdiction which finally decided the matter.

The 2<sup>nd</sup> Defendant cited **John Florence Maritime Services Ltd & Another v Cabinet Secretary, Transport and Infrastructure and 3 Others (2021) eKLR** where the court laid down the elements that must be certified for *res judicata* to apply. The 2<sup>nd</sup> Defendant maintained that the issue of ownership of the suit property was already determined with the participation of the same parties. The 2<sup>nd</sup> Defendant urged the court to struck out the suit for being *res judicata*.

The Plaintiff submitted that the prerequisites of *res judicata* were not satisfied and that his suit did not offend Section 7 of the Civil Procedure Act. He submitted that from the pleading filed, the reliefs sought were different, separate and distinct from the relief sought from the present case. He urged that the parties were not the same and pointed out that Tebere Concrete Company Limited was a party in Kerugoya ELC Case No. 70 of 2017 but not in this

case while the land registrar was not a party in Kerugoya ELC No. 70 of 2017 and the subsequent appeals. He invited the court to be guided by Article 159 (2) of the Constitution and Section 19 (1) of the ELC Act and urged that this being a case concerning an interest land, it ought to be heard on merit as opposed to on technicalities. He urged the court to be guided by **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another (1980) eKRL**. On the point that striking out of pleadings is a draconian remedy that should only be resorted to in the clearest of cases.

The issue of determination is whether this suit should be struck out for being *res judicata*. In the plaint dated 23/10/2024, the Plaintiff claims that the suit property was registered in the 1<sup>st</sup> Defendant's name fraudulently. He admitted entering into the sale agreement dated 7/10/2025. The transaction related to the land known as Mbeere/Wachoro/1617. The land was the subject matter of Kerugoya ELC Case No. 70 of 2017 filed by Tebere Concrete Company Limited against the Plaintiff in this case.

The Plaintiff filed a defence and counter claim in the Kerugoya ELC suit denying the claim by Tebere Company and seeking mesne profits. In his witness statement at paragraph 12, he stated that he sold the land to the 1<sup>st</sup> Defendant on 7/10/2015 and that they complied with all statutory requirements and the title was issued in his name on 25/1/2019. When the Plaintiff was cross-examined by Mr. Mwamuye during the hearing, he stated that there was an agreement between him and the 1<sup>st</sup> Defendant

and that the 1<sup>st</sup> Defendant paid him Kshs. 15.5 million through his bank at KCB Kimathi Branch. On being re-examined he told the court that he did not have any dispute with the 1<sup>st</sup> Defendant. He told the court that he transferred the suit property to the 1<sup>st</sup> Defendant and that he attended the LCB at Siakago. Further, that he signed the transfer forms in favour of the 1<sup>st</sup> Defendant. The Plaintiff did not challenge the sale transaction between him and the 1<sup>st</sup> Defendant in the Kerugoya ELC case and the subsequent appeals lodged before the Court of Appeal. Parties are bound by their pleadings.

The court agrees with the Defendants that this suit is *res judicata*. The question of ownership of the suit property was determined in Kerugoya ELC Case No. 70 of 2017 and Nyeri Court of Appeal Civil Appeals No. 89 and 91 of 1992. The court allows the 1<sup>st</sup> Defendant application dated 5/3/2025. The suit is struck out for being *res judicata*. The Defendants are awarded the costs of the suit.

Delivered virtually at Bungoma this 4<sup>th</sup> day of February 2026.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Ngigi Gichoya for the Plaintiff

Mr. Duncan Okwaro for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant