

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KENYA AT
KERUGOYA
ELCA NO. E012 of 2023

ANN WAMBUI MIANO

(Suing as the Legal Representative of the
Estate of Rosemary Wangeci Miano, Deceased) **1st**

APPELLANT

LUCY NYAWIRA MUKONO **2ND**

APPELLANT

BANCY WAIRIMU MUKONO **3RD**

APPELLANT

IRENE WANJIKU MUKONO **4TH**

APPELLANT

VERSUS

HARRISON MAIN JOSPHAT **1ST**

RESPONDENT

MARY CONSOLATA WAIRIMU KAMAU **2ND**

RESPONDENT

*(Being an appeal from the judgment of Hon. A.K. Ithuku, CM,
delivered on 27th April 2023 in Kerugoya MCELC Case No. E090
of 2012)*

JUDGMENT

1. This appeal arises from the judgment of **Hon. A.K. Ithuku (Chief Magistrate)** delivered on **27th April 2023** in **Kerugoya MCELC No. E090 of 2021**. In that suit, the learned trial magistrate dismissed the appellants' claim

and directed that each party bears their own costs. Aggrieved by the said decision, the appellants, who were the plaintiffs before the trial court, lodged the present appeal vide a Memorandum of Appeal dated 11th May 2023 setting out the following six (6) grounds:

- 1) That the learned magistrate erred in law and fact by deciding the matter in favour of the respondents despite the evidence produced in court.
- 2) That the learned magistrate erred in law and fact in failing to consider/disregarding the appellants' oral and documentary evidence while arriving at his judgment.
- 3) That the learned magistrate erred in law and fact by failing to appreciate that the issue of trust was not fully settled in **ELC Case No. 13 of 2013** as some beneficiaries were not considered in the proceedings.
- 4) That the learned magistrate erred in law and fact by failing to consider the fact that the respondents did not defend the suit.
- 5) That the learned magistrate erred in law and fact by failing to appreciate the fact that the appellants did not seek to challenge the decision in **ELC 13**

of 2013 but to have their own interests addressed.

6) That the learned magistrate erred in law and fact by misinterpreting the various provisions of law and more specifically **Section 7 of the Civil Procedure Act.**

The appellants, therefore, pray that this appeal be allowed, the judgment of the lower court be set aside, and judgment be entered in their favour. They also seek the costs of this appeal and such other relief as this Honourable Court may deem fit to grant.

2. The appeal was canvassed through written submissions. The learned counsel for the appellants filed their submissions dated 13th February 2025, and addressed the grounds of appeal sequentially, beginning with the first and second grounds. She submitted that the evidence of the 3rd appellant was that she neither participated in Kerugoya **ELC Case No. 13 of 2013** nor knew of its existence until after judgment had been delivered. Counsel further argued that the 4th appellant, though she testified in that case, did so under the belief that the suit land solely belonged to their brother, Elias Kamau, the 2nd respondent herein.

It was submitted that the 2nd respondent's advocate in that earlier matter misadvised them on their rights to the suit property, thereby causing them to fail to assert their beneficial interests. The appellants' Counsel contended that the judgment of **Justice Cheron** in **ELC No. 13 of 2013** expressly recognized that the 2nd respondent was to "*hold the land in trust for himself and the rest of the family members.*" Accordingly, she argued that the learned trial magistrate ought to have found that the appellants who testified in the earlier case were unaware of their legal rights, while others were never informed of the proceedings altogether.

3. On the third ground of appeal, counsel submitted that the majority of the appellants were not parties to, nor heard in, the earlier ELC matter. She described the situation as one of *non-joinder* of necessary parties who were equally entitled to a share of the family property. Regarding the fourth ground, counsel faulted the learned trial magistrate for failing to consider the fact that the 2nd respondent did not defend the suit before the trial court.

On the fifth ground, counsel submitted that the appellants did not seek to challenge or overturn the judgment in **ELC No. 13 of 2013**, but only sought to have their own rights and interests determined. She contended that although the original **Parcel Kiine/Gacharu/157** was subdivided into two resultant parcels, **Kiine/Gacharu/5138** and **5139**, these parcels should now be redistributed equally

among all the siblings, including the appellants and respondents, as they are all members of the same family and are equally entitled.

4. On the sixth ground, counsel maintained that the earlier ELC judgment did not determine the rights or entitlements of the appellants, and therefore, the doctrine of res judicata was inapplicable. She insisted that none of the appellants were parties to **ELC No. 13 of 2013** and thus could not be bound by that decision. To support this argument, counsel relied on the decision in the case of **Zaphir Holdings Ltd versus Mimosa Plantation Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR**, where **F. Gikonyo J.** observed that:

“A proper party is the one who is impleaded in the suit and qualifies the threshold of the plaintiff or defendant under Order 1 Rule 1 and 2 respectively, or as a third party or an interested party, and whose presence may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

5. The Counsel argued that the issue of trust in **ELC No. 13 of 2013** was only determined as between the two respondents, and not as between the entire family, as was intended. She submitted that the appellants’ case before the lower court was not an attempt to re-litigate or

appeal against that judgment, but to demonstrate that, besides the two respondents, other siblings were also entitled to a share in the family land. Counsel emphasized that in **ELC No. 13 of 2013**, the 1st respondent only sought his individual share and did not purport to represent the interests of the appellants.

For these reasons, counsel urged the court to find that the suit before the trial court was not res judicata, and to set aside the judgment of the learned magistrate and enter judgment in favour of the appellants as prayed.

6. The learned Counsel for the 1st respondent filed written submissions dated 4th June 2025, in which he identified four issues for determination to be as follows; whether title number **Kiine/Gacharu/157** and the resultant subdivisions were registered in trust for the appellants; whether the suit before the lower court was res judicata; whether the appellants were entitled to the reliefs sought; and who should bear the costs of the suit and appeal.

7. On the first issue, counsel submitted that the appellants did not lead any direct or circumstantial evidence to prove the existence or creation of a new trust arising from the decision in **Kerugoya ELC No. 13 of 2013**. He argued that the issue of trust over the original parcel Kiine/Gacharu/157 had been conclusively determined by Justice E.C. Cherono in the said judgment. Consequently,

the 1st respondent, having been declared the lawful proprietor of **Kiine/Gacharu/5138**, was entitled to enjoy the rights, privileges, and interests attendant to ownership under **Sections 24 and 25 of the Land Registration Act**.

8. Regarding the second issue, counsel submitted that the suit was indeed res judicata. He argued that, contrary to the appellants' assertions, they were not strangers to **ELC No. 13 of 2013**, as the 2nd and 4th appellants had testified in that matter in support of Elias Kamau Josphat, the 2nd respondent herein. Counsel noted that the said appellants had, ironically, opposed the determination of trust in that case, yet they now sought to reopen the same question. He emphasized that the appellants, being siblings to the respondents, had the opportunity to claim their alleged beneficial interests in the earlier case but failed to do so.

9. In support of his argument, counsel relied on the decision in the case of **Beatrice Waruguru & Grace Wambui versus Charles Karani, H.C. Misc. Succession Cause No. 23 of 2005 (Embu)**, where **Lenaola J. (as he then was)** stated:

“I have considered very carefully the circumstances of this cause and I am convinced that, like Kuloba J. found, the parties herein

are now suing in plural whereas initially they were suing in singles. I am certain that when the succession cause did not go their way, and the appeals hit a dead end, their ingenuity took them the path of revocation of the original grant given by the lower court. The effect is to circumvent the decision in that court and attempt to obtain a different verdict yet a verdict has been rendered on the issues. Res judicata must be invoked to tell applicants that no matter what they think of the decision by the lower court, it is the only decision now in operation and this or any other court is estopped from trying the same issues."

10. Drawing from that reasoning, counsel submitted that the doctrine of res judicata ought to be invoked against the appellants and the second respondent, as **Justice E.C. Cheron**'s decision in **ELC No. 13 of 2013** was a judgment *in rem* within the meaning of **Section 44 of the Evidence Act**. He argued that it remains the only valid decision in operation and that this court, or any other court, is estopped from re-litigating the same issues.

11. On the third issue, counsel submitted that if the appellants or the 2nd respondent were aggrieved by the judgment in **ELC No. 13 of 2013**, their recourse lay in

appeal or review, not by instituting a fresh suit. He maintained that granting the reliefs sought in the lower court would, in effect, overturn the earlier judgment. Counsel insisted that the question of customary trust had already been canvassed and determined with finality in that case.

On the fourth and final issue, counsel prayed that costs of both the appeal and the suit in the lower court be awarded to the 1st respondent, being the successful party.

12. From the record of appeal and submissions filed through the learned counsel, the following are the issues arising for the court's determinations:

- a. Whether the learned trial magistrate erred in law and fact in finding that the appellants' suit was res judicata.*
- b. Whether the trial court failed to properly appreciate and determine the issue of trust as pleaded by the appellants.*
- c. What orders should be issued as to costs?*

13. I have carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court decisions cited thereon, and come to the following conclusions:

- a. The appellants commenced the suit before the Chief Magistrate's Court at Kerugoya vide a plaint dated **21st June 2021 in MCELC No. E090 of 2021**. In the suit, they sought, in summary, a declaration that the respondents hold **Land Parcel Nos. Kiine/Gacharu/5138 and 5139** in trust for them, an order for equal distribution of the said parcels among the parties, as well as ancillary orders to facilitate the execution of the transfers by the Executive Officer. They also prayed for costs and any other relief the court might deem just.
- b. The appellants' case, as pleaded, was that during the land consolidation and demarcation exercise, **Land Parcel No. Kiine/Gacharu/157**, the original suit land, was registered in the name of the 2nd respondent. They averred that the parcel had been allocated to him by the clan because he was the firstborn son of the late Josphat Mukono, the father of the 2nd to 4th appellants. They contended that the parents of the 2nd to 4th appellants, together with the 1st and 2nd respondents and the 1st appellant's mother, were raised and resided on the original suit land, and that their parents were buried thereon. The 1st appellant's mother and the 2nd to 4th appellants were said to have left the land only after marriage.

It was further averred that the 1st respondent had previously filed **Kerugoya ELC Case No. 13 of 2013** against the 2nd respondent, in which he claimed three (3) acres out of the original suit land, and that the court in that matter awarded him the said portion. Following that decision, the original parcel was subdivided into **Land Parcel No. Kiine/Gacharu/5138**, registered in the name of the 1st respondent, and **Land Parcel No. Kiine/Gacharu/5139**, retained by the 2nd respondent. The appellants maintained that the two parcels were family or clan land, and that the respondents held them in trust for the wider family, including the appellants. Thus, they sought a declaration of trust and an order for equitable distribution of the land among all beneficiaries.

- c. The 1st respondent vehemently opposed the appellants' claim. He filed grounds of opposition and a notice of preliminary objection, both dated 29th June 2021, as well as a statement of defence dated 15th July 2021.

In the grounds of opposition, the 1st respondent contended that the appellants' application and suit were incompetent and bad in law, frivolous, vexatious, and an abuse of the court process. He further argued that the application was incurably

defective, failed to meet the legal threshold for the grant of injunctive relief, and was res judicata within the meaning of **Section 7 of the Civil Procedure Act**. On those premises, he urged the trial court to dismiss the appellants' application with costs. In the preliminary objection, the 1st respondent asserted that the entire proceedings were improperly before the court as they offended the doctrine of res judicata. He contended that the issues raised in both the plaint and application had already been heard and determined by the Environment and Land Court at Kerugoya in **ELC Case No. 13 of 2013**, through a judgment delivered on **11th December 2020** by **Hon. Justice Cheron**. The 1st respondent maintained that under **Section 7 of the Civil Procedure Act**, no court may entertain a suit in which the matter directly and substantially in issue has been previously determined between the same parties, or those claiming under them, before a competent court. He averred that the plaintiffs and the 2nd respondent, who were parties in the earlier suit, were merely re-litigating the same questions under a different guise. According to him, the doctrine of res judicata operated to bar the present proceedings, and the court was estopped from reopening issues already settled in **ELC Case No. 13 of 2013**. The 1st respondent therefore urged the trial court to strike out and/or dismiss both the notice

of motion dated 21st June 2021 and the entire suit with costs.

- d. In his statement of defence dated 15th July 2021, the 1st respondent denied all the allegations set out in the plaint. He confirmed that the original **Suit Land, Kiine/Gacharu/157**, had indeed been registered in the name of the 2nd respondent during the land adjudication process. He stated that he had sued the 2nd respondent in **Kerugoya ELC No. 13 of 2013**, and that the court rendered judgment in his favour. The 1st respondent asserted that the appellants were well aware of that case, and that some of them even testified as witnesses for the 2nd respondent in those proceedings. He contended that the appellants' current claim was an afterthought, brought only after the determination of **ELC No. 13 of 2013**, and that if they had any legitimate interest in the land, they ought to have asserted it in that earlier suit. The 2nd respondent did not file any defence or participate in the proceedings before the trial court.
- e. The trial court's case was heard on 21st February 2023. The appellants called two witnesses, Bancy Wairimu and Irene Wanjiku who testified as PW1 and PW2 respectively. PW1. adopted her witness statement as her evidence-in-chief. She stated that she was brought up on **Land Parcel**

Kiine/Gacharu/157, which she regarded as their family land, and that she wished for the land to be shared among all the siblings. In cross-examination, she testified that she was a sister to Elias Kamau, Irene Wanjiku, and Lucy Nyawira. She confirmed that the suit land was registered in the name of her brother Elias Kamau, and that she was aware of **Kerugoya ELC Case No. 13 of 2013 between Harrison Maina, the present 1st Respondent, and Elias Kamau, the 2nd Respondent herein**. She acknowledged that in that earlier suit, the court had declared that the land was held by Elias Kamau in trust for Harrison Maina, after which the land was subdivided.

She testified that she later learnt that some of the appellants had testified as witnesses in that **ELC case**. She stated that she was not a party to that case and opted instead to file the present suit before the trial court.

- f. PW2 testified that she had lived on **Kiine/Gacharu/157** since childhood and regarded it as their home. She testified that during the ELC proceedings, she believed the land belonged to their brother, Elias Kamau. She added that Consolata currently resides on the land, while Harrison Maina has also constructed a house there. In cross-

examination, she confirmed that both their parents were deceased and that they were six siblings in total. She admitted that she had testified in **ELC No. 13 of 2013**, and that following the judgment, they did not seek review but instead filed the present suit.

- g. The 1st Respondent, Harrison Maina, testified as DW1. He adopted his witness statement as his evidence-in-chief and produced the documents filed in support of his case. In cross-examination, he stated that he resides on **Kiine/Gacharu/5138**, land he acquired through a court process. He explained that he had filed **ELC No. 13 of 2013** against his brother Elias Kamau, and as a result of the judgment therein, the land was subdivided into two portions. He stated that his siblings did not claim the land during those proceedings and that he has since developed his portion by constructing structures and planting trees.

In re-examination, the 1st Respondent confirmed that the appellants' siblings, Irene Wanjiku Mukono and Lucy Nyawira, had testified as witnesses in the earlier ELC matter. He added that Elias Kamau, against whom he had sued, did not appeal against that decision.

- h. This being a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own

conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the **Court of Appeal** held:

“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

- i. On the question of whether the learned trial magistrate erred in law and fact in finding that the appellants’ suit was res judicata, the appellants have contended that they were not parties to ***Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat***, and therefore, the decision therein could not bind them. They maintained that some of them were unaware of that suit until after its conclusion, and that even those who testified did so under a mistaken belief that the land belonged solely to their brother, Elias Kamau. They thus urged that

the learned trial magistrate erred in dismissing their claim on grounds of res judicata.

A careful scrutiny of the record, however, tells a different story. The appellants' own evidence shows that they were aware of the existence of **ELC No. 13 of 2013**, and indeed the 2nd and 4th appellants testified therein as witnesses for the 2nd respondent, who was then the defendant. Their testimony in that case revolved around the same ancestral parcel of land, Kiine/Gacharu/157, and the same claim of family trust that forms the substratum of the present appeal. While not active participants, the rest of the appellants admitted that they came to know of the suit and its outcome soon thereafter.

- j. It is therefore not accurate to suggest that they were strangers to that litigation. They were fully aware, directly or constructively, of the dispute over the same family land. They had the opportunity to seek joinder in that suit if they believed they had an interest on the suit property, but they did not do so. Their conscious choice to stand aside until the matter was finally heard and determined cannot now be used to reopen it.

k. The doctrine of res judicata is anchored in **Section 7 of the Civil Procedure Act, chapter 21 of Laws of Kenya**, 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.”

Explanation (6) to **Section 7**, states that:

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

In the previous litigation, **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau**

Josphat, was between members of one nuclear family concerning their ancestral land. The right in issue, a private right of beneficial ownership under a customary trust, was a right claimed in common by the same family. The 1st and 2nd respondents, who were parties in that suit, were litigating bona fide in respect of that common family right. Consequently, under Explanation (6), the appellants, who were siblings and members of the same family unit, are deemed to have claimed under those who then litigated.

- I. The Supreme Court in the case of **John Florence Maritime Service Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** addressed itself on the doctrine of resjudicata and stated as follows:

“Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should

ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

Applying these principles to this case, it is evident that all the essential elements of **Section 7** were satisfied. The subject matter is the same, **Land Parcel No. Kiine/Gacharu/157**, and its subdivisions. The issues of existence and beneficiaries of a customary trust, are identical. The parties are the same in substance, being members of the same family, litigating under the same title, and claiming through each other. The earlier matter was determined by a court of competent jurisdiction, and judgment was delivered by the honourable **Justice E.C. Cherono on 11th December 2020**. That decision in **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**, declared the 2nd respondent to hold the land in trust

for himself and the 1st respondent, and consequently, the land was subdivided into **Kiine/Gacharu/5138 and Kiine/Gacharu/5139**. The suit subject matter of this appeal, sought to reopen that finding and reallocate the same land among the same family members.

The learned trial magistrate properly found that the suit was res judicata, as it sought to re-litigate issues that were directly and substantially in issue and finally determined in that earlier suit, **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**.

- m. The appellants' explanations that they were misguided, not joined, or unaware of their rights to the land cannot avail them what they sought in the suit subject matter of this appeal. The law does not permit a person who knew or ought to have known of an ongoing dispute over a right they claim in common to sit by and later attempt to re-litigate the same. Their actual or constructive knowledge was sufficient to bind them under Explanation (6), and their failure to act timeously is their undoing. In the result, this Court finds that the learned magistrate correctly invoked the doctrine of res judicata and properly dismissed the appellants' suit.

n. On whether the trial court failed to properly appreciate and determine the issue of trust as pleaded by the appellants, and being aware that this court has made a finding that the suit before the trial court was *res judicata*, it therefore follows that the learned trial magistrate rightly refrained from delving into the substantive issue of trust. Once a court is satisfied that a matter is caught by the doctrine of *res judicata*, it is divested of jurisdiction to entertain or re-determine any of the issues previously settled by a court of competent and concurrent jurisdiction.

The question of whether the land parcel Kiine/Gacharu/157 was held in trust had already been conclusively determined in **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**, where this very Court, **E.C. Cheron, J**, rendered a final judgment declaring the existence and scope of the trust between the 1st and 2nd respondents. That judgment was neither appealed against nor reviewed, and therefore remains valid and binding. To invite the trial court, or indeed this appellate court, to reopen the same question under the guise of a fresh claim would amount to an impermissible collateral attack on an existing judgment. It would, in effect, require this Court to sit on appeal over a decision of a court of coordinate jurisdiction, something the law does not permit.

o. Therefore, even assuming, without conceding, that the issue of trust could be revisited, such consideration would offend the principle of finality in litigation. The appellants' contention that they were not parties to **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**, despite conceding knowledge of its existence and participation as witnesses, cannot circumvent the binding effect of that judgment under **Explanation (6) of Section 7 of the Civil Procedure Act**, which deems persons claiming under litigants of a private right in common to be bound by the outcome.

Accordingly, this Court holds that once the trial court found the suit to be *res judicata*, it correctly declined to re-litigate the question of trust. This Court equally finds that it has no jurisdiction to reopen or re-evaluate the trust as it has already been heard and determined in **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**.

p. The general principle on costs is set out under **Section 27(1) of the Civil Procedure Act**, which provides that costs follow the event, and that a successful party should ordinarily be awarded costs unless the court, for good reason, orders otherwise.

The rationale behind this principle was well captured in the case of **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 Others [2013] eKLR**, where the Court held that costs are not meant to punish, but to compensate a successful litigant for the expense incurred in defending or prosecuting a matter. In the present case, both the trial court and this Court have found that the appellants' suit was *res judicata*, and therefore the suit was improperly before the lower court. The litigation was thus unnecessary and avoidable had the appellants properly appreciated the binding effect of the previous litigation, being **Kerugoya ELC No. 13 of 2013; Harrison Maina versus Elias Kamau Josphat**.

Nevertheless, considering that the dispute arises among siblings over ancestral land, and given the clear family dynamics evident throughout the record, the Court is persuaded that this is a proper case for each party to bear their own costs in this appeal, just as it was ordered by the lower court. This approach accords with the principles of equity and promotes familial harmony, which the court must encourage where possible.

14. Having come to the foregoing conclusions, the Court finds and orders as follows:

- a. That the appeal lacks merit and is hereby dismissed.*
- b. That the judgment delivered by the learned trial magistrate on 27th April 2023 in Kerugoya MCELC No. E090 of 2021, is hereby upheld.*
- c. Each party shall bear their own costs in the appeal.*

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON
THIS 11TH DAY OF MARCH 2026.**

Kibunja

S. M.

ELC

JUDGE

In the presence of:

Appellants – M/s Nyangati

Respondent – Mr. Njiraini for Ngigi for 1st Respondent

Kinyua - Court Assistant.

S. M.

Kibunja

C JUDGE