

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELCL (O.S) NO. 11 OF 2020**

ALICE NJOKI KARIUKI.....APPLICANT

VERSUS

MOSES GICOVI NYAGA.....1ST RESPONDENT

PYLIS MUTHONI CHAMBARI.....2ND RESPONDENT

LAND REGISTRAR, EMBU.....3RD RESPONDENT

FAITH WANDIRI NTHIGA.....4TH RESPONDENT

STEPHEN NJENGA RUGE.....5TH RESPONDENT

**RULING**

**A. Introduction**

1. This ruling determines the Preliminary Objection dated **17th July 2025** raised by the **5th Respondent** against the Applicant's **Re-Amended Originating Summons dated 6th May 2025**.
2. The objection is premised on the doctrine of **res judicata** under **Section 7 of the Civil Procedure Act**, and on the allegation that the present proceedings constitute an abuse of the court process, the substratum thereof being land parcel **NGANDORI/KIRIGI/13724**.
3. By consent of the parties, the Preliminary Objection was canvassed by way of **written submissions**, which this court has carefully considered.
4. Having considered the pleadings, submissions, and the applicable law, the court distils the following issues for determination:
  - i. Whether the Preliminary Objection meets the threshold of a proper preliminary objection in law;
  - ii. Whether the doctrine of **res judicata** applies to bar the present suit;
  - iii. Whether the suit amounts to an abuse of the court process; and
  - iv. Who should bear the costs.
5. A preliminary objection must raise a **pure point of law**, argued on the assumption that all facts pleaded by the opposing party are correct, and must not require the court to ascertain contested facts or to exercise discretion.

6. This principle has long been settled in Kenyan jurisprudence and remains the touchstone against which any preliminary objection must be tested.
7. The gravamen of the 5th Respondent's objection is that the Applicant's claim is **res judicata**, having been conclusively determined in **Embu High Court Succession Cause No. 649 of 2013**, and allegedly affirmed on appeal in **Nyeri Court of Appeal Civil Application No. E070 of 2022**.
8. The Applicant, on the other hand, disputes both propositions, contending that:
  - o The Succession Cause did not determine questions of **beneficial ownership or title to land**;
  - o The Court of Appeal matter was not an appeal on the merits but merely an application for extension of time; and
  - o The present claim is founded on **adverse possession and/or resulting trust**, matters falling within the exclusive jurisdiction of this court.
9. It is therefore evident that, even at a preliminary level, the court is invited to interrogate:
  - o The pleadings and determination in the Succession Cause;
  - o The nature, scope, and outcome of the Court of Appeal proceedings; and
  - o Whether the causes of action and issues are directly and substantially the same.
10. These inquiries necessarily entail an examination of **records, pleadings, and judicial determinations**, matters which go beyond a pure point of law.
11. On this ground alone, the objection is already on precarious footing.
12. Section 7 of the Civil Procedure Act bars a court from trying a matter where the issue in dispute was directly and substantially in issue in a former suit between the same parties or parties claiming under them, litigating under the same title, and which issue was heard and finally determined by a court of competent jurisdiction.
13. The doctrine serves the important public policy objective of bringing litigation to finality, preventing multiplicity of suits, and protecting the integrity of the judicial process.
14. However, its application is **not mechanical**. All statutory elements must be satisfied concurrently.
15. The former proceedings relied upon were **Succession Cause No. 649 of 2013**, instituted under the **Law of Succession Act**.
16. A succession court's primary mandate is the **administration and distribution of the estate of a deceased person**, including the validity of grants and the identification of beneficiaries.

17. While a succession court may incidentally encounter questions touching on property, it **does not determine ownership or beneficial title to land as between competing claimants**, particularly where such claims are grounded on doctrines such as **adverse possession or trust**.
18. The record, as presented in submissions, indicates that the dispute in the succession cause revolved around the **revocation and confirmation of a grant**, and allegations of exclusion from inheritance.
19. Whether those proceedings finally and conclusively determined the Applicant's present claim of **beneficial ownership over NGANDORI/KIRIGI/13724** is a matter that cannot be conclusively resolved without a substantive examination of the pleadings and judgment in that cause.
20. The Applicant's present claim is anchored on **beneficial interest, adverse possession and/or resulting trust**.
21. These causes of action are **juridically distinct** from a probate dispute challenging the manner of administration or distribution of a deceased's estate.
22. Comparative jurisprudence from common-law jurisdictions similarly recognises that **probate determinations do not bar subsequent proprietary claims**, unless such claims were expressly and finally adjudicated upon.
23. It is not controverted that **Nyeri Court of Appeal Civil Application No. E070 of 2022** was an application seeking **extension of time** to lodge an appeal.
24. The dismissal of such an application is **procedural** and does not amount to a final adjudication on the substantive merits of the dispute.
25. A procedural dismissal cannot, in law, found a plea of res judicata on substantive issues of ownership or beneficial entitlement.
26. The 5th Respondent argued that the Applicant claims under her husband, who was a party in the succession cause, and therefore Explanation 6 to Section 7 applies.
27. While the court accepts that spouses may, in appropriate cases, be privies in interest, the critical question remains **what issue was previously determined**.
28. Privity alone cannot cure the absence of a **final determination of the same issue** now before this court.

29. Abuse of process connotes the improper use of judicial machinery in a manner that is vexatious, oppressive, or intended to subvert justice.
30. Where a party brings a suit founded on a **distinct cause of action**, before a court vested with **constitutional and statutory jurisdiction**, the mere existence of prior proceedings does not, without more, amount to abuse.
31. On the material before the court, the allegation of forum shopping and bad faith has **not been demonstrated at the threshold stage**.
32. In light of the foregoing, this court finds that:
  - a) The Preliminary Objection raises contested issues of fact and law requiring evidential interrogation;
  - b) The applicability of the doctrine of res judicata in the circumstances of this case cannot be conclusively determined as a pure point of law;
  - c) The objection therefore fails to meet the legal threshold of a proper preliminary objection.

**B. Disposition**

33. In view of the foregoing matters, the following consequential orders are issued;
  - i. The **Preliminary Objection dated 17th July 2025 is hereby dismissed**;
  - ii. The suit shall proceed to hearing on its merits;
  - iii. **Costs of the Preliminary Objection shall be in the cause.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 05<sup>TH</sup> DAY OF MARCH, 2026**

.....

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. M/S Theuri for the 4<sup>th</sup> Respondent.
2. Mr. Njagi H/B for M/S Muthoni Ndege for the 1<sup>st</sup> Respondent.
3. M/S Njuguna H/B for Mr. Njoroge for the 5<sup>th</sup> Respondent.

4. Mr. Nyakeriga for the Applicant
5. Mohamed Koja C/A