

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
PETITION NO. E002 OF 2023

MBAKA MITAMBO.....1ST
PETITIONER

MBAKA KITHUMBU.....2ND
PETITIONER

VERSUS

JOSEPH NGARI.....1ST
RESPONDENT

EPHANTUS KIRANGI NYAGA.....2ND
RESPONDENT

JOSEPH NJERU KIUTHO.....3RD
RESPONDENT

NICHOLUS NGUTHI KIVINDA.....4TH
RESPONDENT

ALFRED IRERI NJERU.....5TH
RESPONDENT

EUSTACE NGIRIGACHA MWERECHA.....6TH
RESPONDENT

AGOSTINO NYAGA NJOKA.....7TH
RESPONDENT

NJIRU MWERECHA.....8TH
RESPONDENT

KIRINGA MIUTHO.....9TH
RESPONDENT

**MARY NTHURAKU NJERU.....10TH
RESPONDENT**
**THE CHIEF LAND ADJUDICATION OFFICER.....11TH
RESPONDENT**
**THE CHIEF LAND REGISTRAR.....12TH
RESPONDENT**
**THE HON. ATTORNEY GENERAL.....13TH
RESPONDENT**

RULING

Before this Court is a Notice of Motion Application dated 24th June 2025, brought by the 2nd, 3rd, 9th, and 10th Respondents/Applicants (hereinafter referred to as the "Applicants") pursuant to Sections 1A, 1B, 3A and 7 of the Civil Procedure Act, Cap 21, and Order 2 Rule 15 of the Civil Procedure Rules, 2010. The Applicants seek two principal orders: first, that the Petition dated 1st March 2023 be struck out with costs; and second, that costs of the Application be provided for.

The grounds advanced in support of the Application are multifarious and may be summarised as follows: (a) that the Petition is res judicata to earlier proceedings; (b) that certain Respondents are deceased and have not been substituted; (c) that some suit parcels are non-existent having been subdivided; (d) that there has been material non-disclosure of related proceedings; (e) that the Petition is fatally defective in its internal chronology; (f) that Prayer No. 2 is incompetent as

the Minister lacks jurisdiction over land appeals; and (g) that the Petitioners are guilty of laches.

The Petition filed on 1st March 2023 concerns parcels of land situated within the Mbeere/Mbita Adjudication Section. The dispute is fundamentally a contest between members of the Nditi clan (the Respondents/Applicants) and the Ugweri clan (the Petitioners), with the Petitioners additionally asserting that they purchased portions of the subject land from members of the Ikandi clan. The Petitioners allege violations of constitutional rights to property, fair administrative action, equality before the law, and due process in the course of the adjudication and registration of the subject parcels.

The dispute has a protracted history spanning over four decades, having been the subject of proceedings in Objection Cases Nos. 248/80, 186/80, and 211/80, Minister's Appeal Case No. 49/1051/1997 (Rugano Nthiga v Nyaga Konji), Embu High Court Miscellaneous Application No. 72 of 2003, and Embu ELC Case No. 71A of 2014 (OS), in which judgment was delivered on 26th September 2019. A further appeal to the Court of Appeal at Nyeri vide Civil Appeal No. 10 of 2020 has since abated for non-substitution of a deceased party.

ISSUES FOR DETERMINATION

This Court has distilled the following issues for determination:

- (i) Whether the Petition is res judicata to earlier proceedings;
- (ii) Whether the constitutional framing of the Petition constitutes an abuse of the court process;
- (iii) Whether the additional grounds raised are independently sufficient to warrant striking out;

(iv) Whether the Petition ought to be struck out in its entirety.

ANALYSIS AND DETERMINATION

Section 7 of the Civil Procedure Act, Cap 21, 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. The doctrine of res judicata is not a mere technicality; it is a principle of substantive law premised upon the finality of litigation, the protection of parties from repetitive and vexatious suits, and the conservation of judicial resources. The Court of Appeal articulated these foundational values in *Independent Electoral and Boundaries Commission & Another v Maina Kiai & 5 Others* [2017] eKLR.

The history of litigation over the subject parcels is extraordinary in its length and comprehensiveness. The Objection Cases Nos. 248/80, 186/80, and 211/80 were filed in 1980, prosecuted over a period of more than a decade, and determined by judgment on 10th July 1991. Those proceedings directly concerned the proprietary entitlements to the same parcels of land now the subject of this Petition, and involved the very same competing clan interests — the Nditi clan on the one hand, and the Ikandi clan (whose alleged purchasers are the Petitioners) on the other.

The Minister's Appeal Case No. 49/1051/1997 further engaged the same subject matter. The subsequent judicial review proceedings in Embu High Court Miscellaneous Application No. 72 of 2003 resulted in the quashing of the District Commissioner's award in favour of Rugano Nthiga's Ikandi clan. This Court notes that the quashing of that award was a definitive judicial determination that the proprietary claims of the Ikandi clan — and consequently of any persons claiming to have purchased from that clan — had no legal foundation. Embu ELC Case No. 71A of 2014 (OS), determined by judgment on 26th September 2019, went further still, ordering the rectification of the register in favour of the Nditi clan thereby conclusively vesting title in the Respondents/Applicants.

The Petitioners seek to escape the operation of res judicata by re-characterising their claim as one grounded in constitutional rights — specifically, violations of Articles 40, 47, and 50 of the Constitution. This Court is not persuaded that such re-characterisation is either genuine or permissible in the circumstances.

The test for res judicata is not whether the legal cause of action is identically framed, but whether the matter "directly and substantially in issue" is the same. In *Henderson v Henderson* (1843) 3 Hare 100, the Vice-Chancellor held, and it remains good law, that a party is required to bring forward its whole case and cannot be permitted to re-litigate matters that ought to have been raised in the earlier proceedings. The Kenyan Court of Appeal affirmed this expansive understanding

in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1996] eKLR.

Upon close analysis, every constitutional grievance pleaded in the Petition resolves, at its core, to a complaint about who should own the suit land. The allegation that the Petitioners were denied fair administrative action under Article 47 concerns the adjudication process that was comprehensively reviewed and upheld in the High Court in 2003. The allegation that property rights under Article 40 were violated is simply the proprietary claim dressed in constitutional language — the very claim that was litigated and defeated over multiple proceedings. The allegation under Article 50 concerning the failure to hear a Minister's Appeal is negated by the fact that the same subject matter was thereafter heard in full by a court of competent jurisdiction in ELC Case No. 71A of 2014. There is accordingly no constitutional deficit that remains unremedied.

This Court is guided by the caution expressed by the Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR that a constitutional petition cannot be used as a vehicle to circumvent the finality of prior judicial determinations. Where the constitutional question is in substance a re-litigation of a matter that has been heard and finally decided, the constitutional framing does not shield the petitioner from the operation of *res judicata*. To hold otherwise would be to render the doctrine of *res judicata* a dead letter, applicable only in

cases where parties are insufficiently creative in their pleadings.

The proposition that a distinct "constitutional cause of action" can be maintained independently of a fully litigated proprietary claim requires that the constitutional issues be genuinely separable from the substantive property dispute. In the present case, they are not. The 1st Petitioner was an active participant in the Objection Cases of 1980. The competing clan claims were ventilated and determined. The alleged purchases from the Ikandi clan were raised and implicitly rejected when the Ikandi clan's award was quashed in 2003. A further judicial determination in 2019 completed the chain. The Petitioners have had not one, not two, but multiple opportunities — spanning over forty years — to advance all grounds available to them before courts of competent jurisdiction. They cannot now re-enter through a constitutional door.

The Court of Appeal's guidance in *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, adopted in Kenyan jurisprudence, is that a court should not permit its process to be used as an instrument of oppression. The commencement of this Petition, with full knowledge of the prior proceedings and their outcome, is in this Court's view an abuse of the court process of the most manifest kind. This Court is satisfied that the matter directly and substantially in issue in the present Petition was directly and substantially in issue in the prior proceedings, that those proceedings were between the same parties or parties claiming under them, and that the issues have been heard and finally

decided by courts of competent jurisdiction. The doctrine of res judicata fully applies.

Having found that the Petition is barred by res judicata, the Court makes the following further observations on the remaining grounds, which provide independent or reinforcing justification for striking out. The 5th and 6th Respondents died in 2011 and 2004 respectively. A suit commenced against a deceased person is void ab initio: *Christine Wanjiku Kamau & Another v Paul Kamau Githiomi* [2018] eKLR; *Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another* [2009] KLR. The Petition as filed is therefore a nullity with respect to those parties. The 4th, 7th, and 8th Respondents are similarly averred to be deceased, a matter not meaningfully contested by the Petitioners. Material non-disclosure of the prior proceedings in the Petition's supporting affidavit compounds the Court's concern that these proceedings are not being conducted in good faith.

Prayer No. 2 of the Petition, which seeks the hearing of a Minister's Appeal, is incompetent as a matter of law. The Minister's appellate jurisdiction under the Land Adjudication Act, Cap 284, has been wholly extinguished by the Environment and Land Court Act, 2011 and the Land Registration Act, 2012. No court can grant relief that is legally impossible. The prayer is incurably defective and cannot be salvaged by amendment in a context where the entire proceeding is otherwise untenable.

On the ground of laches, while delay alone cannot defeat a constitutional petition, the Court holds that in a case such as

this — where the delay is of over four decades, multiple proceedings have been finally determined, third-party rights have crystallised through formal registration, and the constitutional framing is not genuine — equity firmly declines to assist the Petitioners. The prejudice to the Respondents, who have litigated across multiple fora and forums and have obtained final judicial recognition of their rights, is manifest and irreversible.

The jurisdiction to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules is to be exercised where it is plain and obvious that the action is unsustainable. That threshold is plainly met in the present case. There is no conceivable basis on which this Petition can succeed. The Petitioners' proprietary claims have been extinguished by multiple final determinations. The constitutional framing does not survive scrutiny. The Petition is infected with multiple jurisdictional and procedural defects. Permitting it to proceed to a full hearing would be to sanction the very mischief that the doctrine of *res judicata* and the rule against abuse of process are designed to prevent.

This Court has been alive to the spirit of Article 159(2)(d) of the Constitution, which requires justice to be administered without undue regard to procedural technicalities, and to Article 48, which guarantees access to justice. However, these provisions do not require a court to countenance proceedings that are fundamentally and irreparably defective. Access to justice is not a licence for perpetual litigation of finally decided matters. The constitutional imperatives of access to justice and

of finality of litigation must be held in balance, and in the circumstances of this case, the balance falls decisively in favour of finality.

ORDERS

In light of the foregoing, this Court makes the following orders:

1. The Notice of Motion Application dated 24th June 2025 is hereby allowed in its entirety.
2. The Petition dated 1st March 2023 is hereby struck out in its entirety with costs to the Applicants.
3. The Petition is struck out on the primary ground that it is res judicata to the proceedings in Objection Cases Nos. 248/80, 186/80, and 211/80, Minister's Appeal Case No. 49/1051/1997, Embu High Court Miscellaneous Application No. 72 of 2003, and Embu ELC Case No. 71A of 2014 (OS), all of which conclusively determined the proprietary rights in the suit parcels between the same parties or their privies.
4. In the alternative and without prejudice to the primary ground, the Petition is struck out for abuse of the court process, the constitutional framing being found to be an impermissible attempt to re-litigate finally decided claims.
5. The Petition is additionally struck out as a nullity insofar as it was filed against the 5th and 6th Respondents who were deceased at the time of filing.
6. Costs of the Application and of the Petition are awarded to the Applicants and shall be borne jointly and severally by the Petitioners.
7. The matter is hereby marked as finally concluded.

It is so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 14TH DAY OF
MAY, 2026

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. M/S Wanjiku H/B Mr. Njiru Mbogo for the Petitioners
2. M/S Mukami Boore for the 2nd, 3rd, 9th and 10th Respondents
3. M/S Ruth C/A