Mucheke & another (Suing as the Legal Representative of the Estate of Genesio Murungi (Deceased)) v M'Miriti & another (Environment and Land Appeal E008 of 2023) [2025] KEELC 5529 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5529 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E008 OF 2023

JO MBOYA, J

JULY 24, 2025

BETWEEN

GERRALD MUCHEKE ..... 1ST APPELLANT

NAHASHON MUTEMBEI MURUNGI ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GENESIO MURUNGI (DECEASED)

AND

GIDDIEL C RIUNGU M'MIRITI ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF MERU ..... 2ND RESPONDENT

JUDGMENT

1. The Appellants herein [who were the Plaintiffs in the subordinate Court] filed the Plaint dated the 31st August 2018 and wherein the Appellants' herein sought the following reliefs:

    a. An Order for removal of the Caution registered against Plot No. 23C Kiangua Market at the instance of the Defendant.

    b. Costs of the suit together with Interests.

    c. Any other relief.

2. The 1st Respondent duly entered Appearance and thereafter filed a Statement of Defence dated the 12th November 2018 and wherein the 1st Respondent denied the claims at the foot of the Plaint. Furthermore, the 1st Respondent contended that the Appellants' Claim to Plot No. 23 C, Kiangua Market is fraudulent.

3. Subsequently, the 1st Respondent sought and obtained Leave to file an Amended Statement of Defence and Counterclaim. To this end, the Court proceeded to and rendered a Ruling culminating into Leave being granted to the 1st Respondent. For good measure, the 1st Respondent was granted liberty to file and serve an amended Statement of Defence and Counter-claim.

4. The 1st Respondent filed an amended Statement of Defence and Counter-claim dated the 31st May 2021 and which amended Statement of Defence was deemed duly filed pursuant to the Ruling rendered on the 3rd February 2022. The reliefs sought at the foot of the counter-claim are as hereunder:

    a. A declaration that the Sub-division of Plot No. 23 A Kiangua Market into 23A and 23C and the transfer of 23C to the Defendants was fraudulent, null and void.

    b. An Order nullifying the subdivision of 23A and the transfer of the resultant Plot No. 23C to the Defendants and reverting the same to the Plaintiff.

    c. Costs of the suit and the Counterclaim.

5. The suit before the subordinate Court was heard and disposed of vide Judgment delivered on the 29th June 2023, whereupon the Learned Trial Magistrate found and held that the Appellants' [Plaintiffs' in the Subordinate Court] had not proved their case to the requisite standard. To this end, the Court proceeded to and dismissed the Appellants' suit. On the contrary, the Learned Trial Magistrate found and held that the 1st Respondent had duly proved his counter-claim to the requisite standard and thereafter proceeded to and entered Judgment in favour of the 1st Respondent.

6. Aggrieved by the Judgment and the consequential Decree of the Subordinate Court, the Appellants' herein approached the Court vide Memorandum of Appeal dated the 25th July 2023 and wherein the Appellants have highlighted the following grounds of Appeal:

    i. The Learned Trial Magistrate erred in fact and law by finding the 1st Respondent had proved his case on the balance of probabilities contrary to the evidence adduced during the hearing.

    ii. The Learned Trial Magistrate disregarded and ignored the totality of the evidence tendered before himself and thereby abandoned his judicial mandate and responsibility albeit without any lawful cause or basis.

    iii. The Learned Trial Magistrate failed to appreciate, consider and address the relevant and pertinent features of the Appellants' case and pleadings and thereby abandoned his judicial mandate and responsibility, albeit without any lawful cause or basis.

    iv. The Learned Trial Magistrate erred in law and fact by finding that the sub-division and transfer of Plot No. 23A Kiangua Market into 23A, 23B and 23C was fraudulent, null and void, notwithstanding no evidence was adduced to support the claim.

    v. The Learned Trial Magistrate erred in fact and in law by disregarding the evidence adduced by the 2nd Respondent and thereby contravening the established principles of Law.

    vi. The Learned Trial Judge erred in fact and law by failing to appreciate the issues of ownership of Plot No. 23A, 23B and 23C Kiangua Market was determined in Civil Case No. 348 of 1986 and High Court Civil Appeal No. 44 OF 1990 (unreported) between Joshua M'Miriti & Mbuki Njuuri v Gerrald Mucheke & Genesio Murungi, thus the Judgment of the Learned Trial Magistrate contravenes the mandates provisions of Section 7 of the *Civil Procedure Act* Cap 21.

vii. The Learned Trial Magistrate failed to cumulatively and exhaustively evaluate the entire evidence on record and hence failed to decipher the salient issues and features of the suit before him (trial Magistrate) and thus arrived at an erroneous conclusion, contrary to and in contradiction of the uncontroverted evidence.

viii. The Judgment and direction of the Honorable Trial Magistrate is nullity ab initio and a mockery of the due process of the law and hence ought to be set aside ex-debito justice.

7. The Appeal beforehand came up for directions on the 8th day of April 2025; whereupon the Advocates for the respective parties covenanted to canvass and dispose of the Appeal by way of written submissions. To this end, the Court proceeded to and issued directions pertaining to the Hearing and disposal of the Appeal. Furthermore, the Court ventured forward and circumscribed the timelines for filing and exchange of the written submissions.

8. The Appellants filed written submissions dated the 12th May 2025; and wherein the Appellants have raised and canvassed four [4] salient issues for consideration. Firstly, Learned Counsel for the Appellants has submitted that the Counter-claim that was raised and canvassed by the 1st Respondent was prohibited by the Doctrine of Res judicata. To this end, Learned Counsel for the Appellants' posited that the 1st Respondent's father [now deceased] had filed a previous suit touching on and concerning ownership of Plot No. 23 Kiangua Market.

9. Furthermore, Learned Counsel for the Appellants has submitted that the suit which had been filed by the 1st Respondent's Father, now deceased, was heard and dismissed. In addition, it was contended that following the dismissal of the suit on behalf of the 1st Respondent's Father, the 1st Respondent's father filed an appeal, namely; Meru HCCA No. 44 OF 1990, which Appeal was also heard and dismissed. Moreover, it has been submitted that the 1st Respondent's Father was condemned to pay Costs to the Appellants.

10. Arising from the fact that the 1st Respondent's Father is said to have filed Meru SRMCC No. 348 OF 1986 and thereafter Meru HCCA No. 44 OF 1990, it was contended that the Counter-claim by the 1st Respondent is therefore barred by the Doctrine of Res Judicata.

11. In support of the submissions touching on the Doctrine of Res-judicata and the Legal implications attendant thereto, Learned Counsel for the Appellants have cited various decisions including Manju Naul v George Macheho Mungai & 2 Others [2017] eKLR: Hernderson v Hernderson [1843 – 60] All Er Page 378; Bedford Mutegi Mboani & 4 Others v James Mbaka [2019] eKLR; William Mutura Kairiba v Samuel Nkari & 4 Others [2019] eKLR, Mebyu Wangombe & Another v Patani virpal & 2 Others [2015] eKLR And Iebc v Maina Kiai & 5 Others[2017] eKLR; respectively.

12. Secondly, Learned Counsel for the Appellants has submitted that the Counter-claim by the 1st Respondent was barred and prohibited by the provisions of Section 4 (2) of the Limitations of Actions Act, Chapter 22, Laws of Kenya. In particular, it was contended that the 1st Respondent, having pleaded that the Fraud underpinning the Counter-claim occurred in 2006, then it behooved the 1st Respondent to file the Counter-claim or, better still, the suit founded on Fraud within 3 years of the occurrence of the fraud or the discovery thereof.

13. Nevertheless, Learned Counsel for the Appellants has submitted that despite indicating that the fraud was discovered in the year 2006, the Counter-claim beforehand was not filed up to and including the 23rd February 2023. In this regard, Learned Counsel for the Appellants has contended that the Counter-claim is statute-barred.

14. Thirdly, Learned Counsel for the Appellants has submitted that even though 1st Respondent had pleaded and particularized fraud, same [1st Respondent] did not tender and produce before the Court any plausible or cogent evidence to prove Fraud. In particular, it was submitted that the burden of proving fraud lay at the doorstep of the 1st Respondent.

15. Moreover, it was submitted that it was incumbent upon the 1st Respondent to lay before the Court evidence to prove the fraud to the requisite standard. To this end, Learned Counsel for the Appellants has submitted that the standard of proof as pertains to fraud is slightly higher than the standard of balance of probabilities.

16. To support the submissions pertaining to proof of fraud, Learned counsel for the Appellants has cited and referenced various decisions, including Dennis Noel Ochwada & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR; Evans Odero Nyakwana v Cleophas Bwana Ongaro [2015] eKLR Central Bank Of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR And vijay Morjaria v Nansingh Madhusingh Dabar & Another [2000] eKLR.

17. Finally, Learned Counsel for the Appellants has submitted that insofar as the 1st Respondent is the one who lodged the Caution against Plot No. 23C Kiangua Market, it was incumbent upon the 1st Respondent to justify the basis why the Caution should remain in place. Nevertheless, it was posited that the 1st Respondent did not demonstrate any lawful basis to warrant the continuation of the Caution or at all.

18. To buttress the submissions that it was incumbent upon the 1st Respondent to justify the basis for maintenance of the Caution, Learned Counsel for the Appellants has cited the decisions in the case of Milka Muthoni Wangoco v The County Counsil Of Kirinyaga & 2 Others [2017] eKLR And Maria Ngangi Gwako v Charles Mwenzi Ngangi [2014] eKLR, respectively.

19. Flowing from the foregoing submissions, Learned Counsel for the Appellants has submitted that the Appeal beforehand is merited. In this respect, the Court has been invited to find and hold that the appeal is meritorious and thus same ought to be allowed.

20. The 1st Respondent filed written submissions dated the 11th June 2025; and wherein same has raised and highlighted four [4] key issues, namely; whether the Appellants had proved their case; whether the 1st Respondent had proved his Counter-claim; whether the 1st Respondent's Counter-claim was time barred and whether the 1st Respondent's Claim is prohibited by the Doctrine of res-judicata or otherwise.

21. Regarding the issue as to whether the 1st Respondent's Counter-claim was time-barred, Learned Counsel for the 1st Respondent has submitted that the issue of the Counter-claim being time-barred was neither raised nor highlighted at the foot of the Appellants' Statement of Defence to the Counter-claim. To this end, Learned Counsel for the 1st Respondent has posited that the issue of the Limitations of Actions Act cannot now be canvassed by the Appellants.

22. To buttress the foregoing submissions, Learned Counsel for the 1st Respondent has referenced the provisions on Order 2 Rule 4 of the Civil Procedure Rules, 2010. Moreover, learned counsel for the 1st Respondent has also cited and referenced the decision in Wilson Kazungu Katana & 101 Others v Salim Abdala Bakshwein & Another [2015] KECA 728.

23. Regarding whether the Counter-claim was barred by the Doctrine of Res judicata, Learned Counsel for the 1st Respondent has submitted that the Appellants did not tender and/or produce the proceedings and Judgment in respect of the previous suits to warrant a finding of Res-judicata. In

particular, it was submitted that without the proceedings in Meru SRMCC 348 OF 1986 and Meru HCCA NO. 44 OF 1990, the plea of res judicata was not proved and thus this Court should come to the same conclusion as the Trial Court.

24. As pertains to whether the Appellants proved their case, it has been submitted that the Appellants herein did not tender and/or produce before the court any plausible evidence to confirm their claim to ownership of Plot No. 23C Kiangua Market. In particular, it was submitted that even though the Appellants had contended that Plot No. 23C, Kiangua Market was initially allocated to three individuals and thereafter one of the three individuals was unable to repay a loan culminating into the portion being sold, the Appellants did not place before the Court evidence of such sale and evidence of purchase by Genesio Murungi.

25. Additionally, it was submitted that even though the Appellants had posited that an Application was made to facilitate the sub-division of Plot No. 23 A into three [3] portions, the Appellants did not tender any Application for such sub-division. Moreover, it was posited that the Appellants admitted that same did not produce evidence to show how same acquired Plot No. 23C Kiangua Market.

26. Premised on the foregoing, Learned Counsel for the 1st Respondent has submitted that the Appellants did not tender and/or produce before the court any credible or plausible evidence to demonstrate their claim as pertains to ownership of Plot No. 23C Kiangua Market.

27. Regarding the last issue, namely; whether the 1st Respondent has proved his Counter-claim, Learned Counsel for the 1st Respondent has submitted that the evidence that was tendered by the 1st Respondent demonstrated clearly that the suit property, namely, Plot No. 23A, belonged to JOSHUA MIRITI [now Deceased]. Furthermore, it was contended that the said Joshua Miriti developed the suit property by constructing a two-door building thereon. Furthermore, it was posited that Joshua Miriti [now Deceased] subsequently gave a portion of the Plot to his brother, namely, Mbiuki Njuki, who thereafter erected a one-door building.

28. It was the further submissions by Learned Counsel for the 1st Respondent that subsequently, the 1st Respondent applied to sub-divide Plot No. 23A into two portions, culminating into Plot No's 23A and 23B, with the latter parcel being transferred to Mbiuki Njuki. Moreover, it was submitted that Plot No. 23A remained in the name of the 1st Respondent.

29. Additionally, it was submitted that the Appellants herein were not able to tender and produce before the court any evidence of an Application for Sub-division of Plot No. 23A, which was made by Joshua Miriti. In any event, it was posited that the said Joshua Miriti [now Deceased) did not apply for the sub-division of Plot No. 23A. Besides, it was also submitted that the said Joshua Miriti also did not transfer Plot No. 23C to the Appellants.

30. Arising from the foregoing, it was posited that the purported sub-division of Plot No. 23A and the consequential transfer of Plot No. 23C to the Appellants herein were therefore informed by Fraud. To this end, it was contended that the Learned Trial Magistrate arrived at and reached the correct conclusion in finding that the creation of Plot No. 23 C Kiangua Market was a fraud.

31. In view of the foregoing, Learned Counsel for the 1st Respondent has invited the Court to find and hold that the Appeal beforehand is bereft of merits and thus same ought to be dismissed.

32. Having reviewed the Record of Appeal; having considered the evidence that was tendered before the Subordinate Court [both oral and documentary] having taken in to account the written submissions filed by the parties and upon consideration of the applicable law, I come to the conclusion that the determination of the subject Appeal turns on Four [4] key issues, namely: whether the Counter-claim

by the 1st Respondent was barred by the Doctrine of Res-judicata or otherwise.; whether the Counter-claim by the 1st Respondent was barred by the Limitations of Actions Act or otherwise; whether the 1st Respondent proved and established fraud to the requisite standards or otherwise; and whether the Appellants herein, established their claim before the Subordinate Court or otherwise.

33. Before venturing to address and analyze the thematic issues highlighted in the preceding paragraph, it is imperative to recall that what is before me is a first Appeal. By virtue of being a first Appeal, this Court is clothed with the requisite Jurisdiction to undertake exhaustive scrutiny, evaluation, analysis and review of the evidence that was tendered before the Subordinate Court and thereafter to arrive at an independent conclusion. Furthermore, there is no gainsaying that this Court is at liberty to depart from the factual findings and conclusions of the Trial Court, provided that the basis for such departure is well-informed and grounded. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

34. Be that as it may, it suffices to underscore that even though this Court is at liberty to arrive at an independent conclusion and to depart from the factual findings of the Trial Court, it must be appreciated that such departure can only arise where the factual findings and conclusions were arrived at on no evidence; perverse to the evidence on record; based on misapprehension of the evidence on record; or where it is demonstrably shown that there exists an error of principles which vitiated the conclusions arrived at by the Trial Court.

35. Moreover, it is appropriate to highlight that, barring the existence of the factors which permit departure from the factual findings and conclusions of the Trial Court, this Court is called upon to defer to the findings of the Trial Court. In this regard, the rule of the Thumb is to the effect that the Jurisdictional remit of this Court, while dealing with a first Appeal, is circumscribed by the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya. Simply put, the Court dealing with a first Appeal cannot just depart from the factual findings and conclusions of the Trial Court at will without being satisfied with the laid down parameters.

36. The Jurisdictional remit of the first Appellate Court has been the subject of various Court decisions. To this end, it suffices to observe that the parameters guiding the Court while handling a first appeal are now well settled.

37. Most recently, the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) re-visited and expounded on the principles as hereunder:

> " We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course, where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgment. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and re-analyse the extracts of the record and draw its own conclusions.

These provisions have been underscored in numerous decisions of the Superior Courts, among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...

It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

[See also the decisions in the case of County Assembly of Kwale and Others v Dzilla [2025]KECA; and Doshi v Justice Charles Chemutut and 7 Others [2025]KECA].

38. Duly guided by the principles espoused in the decisions [supra], I am now well disposed to revert to the subject matter and discern whether the Learned Trial Magistrate correctly evaluated the evidence that was tendered before him and thereafter arrived at the correct conclusions and/or findings.

39. Back to the issues. Regarding the first issues, namely; whether the Counter-claim by the 1st Respondent was/is barred by the Doctrine of Res-judicata, it is instructive to recall and reiterate that whosoever

seeks to propagate the plea of res-judicata, is called upon to tender and produce before the Court inter alia, the pleadings that were filed in respect of the previous suit; the proceedings undertaken in the previous suit; and the Judgment/final determination in respect of the previous suit.

40. It is important to underscore that before a Court of law can come to the conclusion that the issues raised in the subsequent suit had been canvassed and determined in the previous suit, the Court must be treated to the totality of the documentation that are underpinning the claim of res judicata. Suffice it to state that a Court can only come to the conclusion that the subsequent suit is res-judicata, if it is proven that the previous suit touched on and concerned the same subject matter; involved the same parties or their representatives; the matter was heard and determined on merits; and that the Court that rendered the determination was competent and seized of the requisite Jurisdiction to handle and determine the same and not otherwise. [See Section 7 of the *Civil Procedure Act*].

41. The essential ingredients that underpin the plea of res judicata were highlighted and elucidated by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR) where the Court stated as hereunder:

> " Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequences because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010.
>
> "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 the 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."
>
> Thus, 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.
>
> (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."

42. The Doctrine of res-judicata and the ingredients that underpin same were re-visited by the Supreme Court of Kenya [the apex Court] in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)

> " 59. 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)

v. Finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, [2012] eKLR, thus: 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 the form of a new cause of action, which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, [2001] EA 177, the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a)There is a former judgment or order which was final; b)The judgment or order was on merit; c)The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d)There must be between the first and the second action identical parties, subject matter and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)

43. Flowing from the foregoing, it is common ground that it was incumbent upon the Appellants to tender and produce before the Trial Court evidence of the proceedings that were undertaken before the court which entertained the previous suit. Moreover, it was incumbent upon the Appellants to place before the Court the Judgment of the Courts whose decisions are being relied upon to underpin the plea of res judicata.

44. However, it is not lost on me that the Appellants herein did not tender and/or produce before the Trial Court the Judgments [if any] that were delivered by the Subordinate Court in respect of SRMCC No. 348 of 1986 and the Judgment, if any, that was delivered vide Meru HCCA No. 44 of 1990. In the

absence of the Judgments [if any] that were delivered by the Courts, it is difficult, nay impossible, to appreciate the conclusions and determinations of the said Court[s].

45. Suffice it to posit that before I can return a finding of res judicata, I must satisfy myself that all the ingredients highlighted at the foot of Section 7 of the *Civil Procedure Act* [Supra] have been met and/or established. In any event, there is no gainsaying that the ingredients must be established conjunctively.

46. I am afraid that the Appellants herein did not place before the Trial Court the requisite material and/or evidence to warrant a finding of res judicata. For good measure, it was not enough to place before the Trial Court a copy of the Plaint filed in respect of Meru SRMCC No. 348 of 1986; Chamber Summons Application filed in Meru HCCA No. 48 of 1990; a copy of the Bill of Costs and assorted acknowledgements in respect of payments of monies that were deposited with the Law Firm of Gatari Ringera & Company Advocates. The said documents cannot help a Court of Law in ascertaining what was the Judgment of the Court.

47. Regarding the issue of whether the Counter-claim by the 1st Respondent was barred by the Limitations of Actions Act, it is instructive to observe that the Appellants herein filed a Reply to the Statement of Defence and Defence to the Counter-claim. For good measure, the Reply to Defence and Defence to Counter-claim are dated the 25th March 2022. [See pages 73 and 74 of the Record of Appeal].

48. From the Defence to the Counter-claim, it is evident that the Appellants herein did not raise and/or canvass the plea of Limitations at the foot of the Statement of Defence. Further and in any event, there was not even a mere mention of the Limitation of Actions.

49. It is instructive that before a litigant can be allowed to propagate the plea of Limitation, it behooves the litigant [in this case, the Appellants] to implead Limitation at the foot of the Statement of Defence. [See the provisions of Order 2 Rule[s] 4 and 10 of the Civil Procedure Rules, 2010].

50. The Court of Appeal has had occasions to deliberate on this salient issue. In the case of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] KECA 728 (KLR), the Court observed thus:

> " There having been no challenge mounted against the counterclaim on account of time limitation at the trial and in the absence of a pleading of time limitation by way of defence to the counter claim, or affidavit, by dint of Order 2 Rule 4(1) of the Civil Procedure Rules which mandatorily requires a plea of time limitation to be by way of pleadings then the appellants were barred from raising that aspect in their final submissions. That act was more or less an ambush on the respondents, who could have been denied a chance to rebut it. In any event, it is an old truism that a party is bound by its pleading. In the premises, the trial court was right in rejecting that submission."

51. To my mind, the Appellants having failed to highlight and canvass the plea of Limitation at the foot of the Statement of Defence, same cannot now seek to propagate submissions on the question of Limitation. Moreover, there is no gainsaying that the submissions anchored on Limitation must be founded on the pleadings filed. In the absence of any pleading[s] highlighting the plea of Limitation, it is apparent that the submissions by and on behalf of the Appellants are based on quicksand.

52. Furthermore, it is common ground that submissions cannot substitute pleadings and/or evidence. In any event, submissions must only follow the pleadings and not otherwise. To this end, it suffices to

reference the decision of the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event, all the 1st respondent would claim and prove as the loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."

53. Bearing in mind the dictum raised in the decision [supra], I come to the conclusion that the submissions by the Appellants and touching on the question of Limitation of Actions, are misconceived and legally untenable.

54. Turning to the issue of whether the 1st Respondent proved the plea of Fraud as against the Appellants and the 2nd Respondent, it is imperative to recall and reiterate that it is the 1st Respondent who raised the cause of action based on fraud. To this end, there is no gainsaying that the burden of proving fraud rested with the 1st Respondent and not otherwise.

55. Furthermore, there is no gainsaying that the standard of proof as pertains to fraud is slightly higher than the standard of balance of probabilities. For good measure, proof of fraud must be undertaken to the satisfaction of the Court or, better still, to the intermediate standards. Suffice it to posit that the intermediate standard is the standard that lies between the balance of probabilities and beyond a reasonable doubt.

56. The Law as it pertains to proof of fraud has been highlighted in several decisions. Nevertheless, it suffices to reference the decision of the Court of Appeal in the case of Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR), where the Court stated as hereunder:

> " The law is clear and we take it from the case of vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where
>
> Tunoi, JA. (as he then was) stated as follows:
>
> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].
>
> The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.
>
> 26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau v George Kamau [2015] eKLR expressed itself as follows:
>
> "...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely

on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

57. Most recently, the Court of Appeal re-visited the standard of proof as pertains to fraud in the case of Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment).

58. For coherence the Court observed thus:

> "In the often-cited decision of this Court in the case of vijay Morjaria v Nansingh Madhusingh Dabar & Another [2000] eKLR, Tunoi, JA. stated that: "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.
>
> It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
>
> 42. In the same vein, the Court in the case of Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR reiterated that: "It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR (G&F) 742 wherein the Court stated that:"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

59. Did the 1st Respondent place before the Trial Court any plausible or cogent evidence to demonstrate that the sub-division of Plot No. 23A Kiangua Market was fraudulently undertaken or otherwise? Additionally, did the 1st Respondent demonstrate that Plot No. 23A Kiangua Market was sub-divided in the year 2006 as alleged or otherwise?

60. To start with, evidence abound that Plot No. 23A Kiangua Market was the subject of deliberations by the County Council of Meru on the 23rd day of October 1984. To this end, the Appellants tendered and produced the minutes wherein the Application by Joshua Miriti was considered and thereafter approved. [See exhibit P6].

61. It is also instructive to recall that the Appellants tendered and produced before the Court the minutes of the County Council of Meru held on the 19th December 1984 and wherein the previous minutes of the 23rd day of October 1984 were adopted by the full Council. For good measure, the latter minutes were duly certified on behalf of the County Government of Meru.

62. Though the 1st Respondent had contended that Plot No. 23A Kiangua Market was fraudulently subdivided, culminating into Plot No's. 23A and 23C, the 1st Respondent did not challenge the validity and/or authenticity of the said minutes. To my mind, the minutes which were tendered and produced by the Appellants and whose authenticity was re-affirmed by DW1, demonstrate that the

sub-division of Plot No. 23A Kiangua market into three portions was undertaken at the request and on the basis of an Application by Joshua Miriti [now Deceased].

63. Moreover, it is not lost on me that DW1 reiterated the validity of the Letter dated the 7th October 2016 and the minutes that were tendered by the Appellants. For ease of appreciation, it is instructive to reproduce the evidence of DW1while under cross-examination by Learned Counsel for the Appellants.

64. Same testified as hereunder:

> " Exhibit 4 – is a Letter from the County Government. I stand by the contents of the letter. The documents are true records of the County Government [P. Exhibit 6]

65. What I hear DW1 to be confirming is that the Letter dated the 7th October 2016 and which was addressed to the Commission on Administration of Justice [CAJ] following a complaint by the 1st Respondent, confirms the fact that Plot No. 23A Kiangua Market was lawfully subdivided.

66. It is instructive to recall that the contents of the said letter [Letter dated 7th October 2016] have also not been challenged. In any event, it is worth recalling that it is the 1st Respondent who had laid the complaint with the Commission on Administration of Justice; and which Complaint resulted into the response under reference.

67. Other than the foregoing, it is also imperative to take cognizance of the fact that, despite contending that Plot No. 23A was only subdivided into two portions in the year 2006, the 1st Respondent did not tender and produce any minutes to demonstrate any such subdivision. In any event, the minutes arising from the meeting held on the 3rd November 1998 only touched on the change of ownership of Plot No. 23A Kiangua Market from Joshua Miriti to the 1st Respondent.

68. I am afraid that the 1st Respondent did not place before the Trial Court any plausible evidence to demonstrate that the sub-division of Plot No. 23A Kiangua Market was fraudulent or otherwise. For good measure, it was not enough for the 1st Respondent to throw omnibus and generalized allegations on the face of the Court and thereafter imagine that fraud was proved.

69. In my considered view, the 1st Respondent did not discharge the requisite standard of proof. Further and in any event, it is not lost on me that if the 1st Respondent discovered the fraud in the year 2006, same would not have waited until 26th of September 2016 to lodge a Complaint with the Commission on Administration of Justice.

70. In a nutshell, I am constrained to and do hereby depart from the factual conclusion by the Learned Trial Magistrate that fraud was duly established and/or proved. Sadly, the totality of the evidence on record does not buttress the conclusion that was arrived at by the Learned Magistrate.

71. Regarding the issue as to whether the Appellants duly established their claim to Plot No. 23C Kiangua Market, it is imperative to take into account the minutes arising from the meeting of the County Council of Meru held on the 23rd day of October 1984; the minutes of the County Council of Meru held on the 19th day of December 1984; the various receipts on account of Rates payments issued by the County Council of Meru and the Letter dated the 7th October 2016 [written by the Commission on Administration of Justice]. Suffice it to posit that the totality of the said documents demonstrates that Plot No. 23A was lawfully subdivided into three portions, namely; Plot No. 23A, 23B and 23CKiangua Market, respectively.

72. Furthermore, it is also important to recall that DW1 is the only witness who testified from the County Government of Meru. Suffice it to reiterate that the records pertaining to the sub-divisions of Plot No.

23A Kiangua Market and the ownership status of the resultant sub-divisions can only be procured from the County Government of Meru.

73. To this end, there is no gainsaying that the evidence tendered by DW1 must be treated with the seriousness it deserves. Suffice it to underscore that unless compelling reasons and evidence are tendered [which is not the case], this Court is entitled to believe the evidence of DW1.

74. Flowing from the foregoing, I come to the conclusion that the Appellants herein indeed placed before the Trial Court plausible, cogent and believable evidence proving that same are indeed the owners of Plot No. 23C Kiangua Market. In this regard, the Appellants are indeed entitled to exclusive possession, occupation and use of the said Plot.

75. To buttress the foregoing findings, I beg to reference the holding in the case of Waas Enterprises Limited v City Council of Nairobi & another [2014] KEELC 605 (KLR).

> As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land.
>
> [See also the holding in the case of Moya Drift Farm Limited v Theuri [1973]EA 173; and Mohanson [K] Limited v Registrar of Titles [2017]eKLR, respectively].

76. On the contrary, I come to the conclusion that the 1st Respondent herein has neither demonstrated or proven any lawful basis to warrant the continuation of the Caution. Suffice it to state that the registration of the impugned Caution impacts on the Appellants' rights to and in respect of the suit property.

Final Disposition.

77. Having analyzed the thematic issues that were highlighted in the body of the Judgment, it must have become crystal clear that the Appeal beforehand is merited. To this end, I am minded to allow the Appeal.

78. Consequently, and in the premises, the final Orders that commend themselves to me are as hereunder:

    i. The Appeal be and is hereby allowed.

    ii. The Judgment of the Learned Trial Magistrate dated the 29th June 2023 be and is hereby set aside.

    iii. In lieu thereof, Judgment be and is hereby entered in favour of the Appellants and in terms of the Plaint dated the 31st day of August 2018.

    iv. The Caution registered against Plot No. 23C Kiangua Market be and is hereby vacated and/or removed.

    v. The 1st Respondent's Counter-claim dated the 31st day of May 2021 be and is hereby Dismissed.

    vi. Costs of the Appeal be and are hereby awarded to the Appellants.

    vii. Costs of the suit and the counter-claim in the Subordinate Court be and are hereby awarded to the Appellants.

    viii. Costs in terms of clause [vi] and [vii] shall be agreed upon and in default to be taxed by the Deputy Registrar and/or Assessed [whichever is applicable].

ix. It is so Ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF JULY 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma – Court Assistant

Ms. Gikundi for the Appellants

Mr. Kaberia for the 1st Respondent

No appearance for the 2nd Respondent