



**REPUBLIC OF KENYA**

**IN THE E.L.C. OF KENYA AT EMBU**

**CONSTITUTIONAL PETITION NO. 1 OF 2017**

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(1), 2(2), 2(4), 3(1), 6(2), 10, 35(1), 47, 62(2), (3) AND (4), 67, 232 (1), 258 AND 259 (1) OF THE CONSTITUTION OF KENYA**

*AND*

**THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA**

*BETWEEN*

**ELIJAH NJERU GACHOKI.....1<sup>ST</sup> PETITIONER**

**JAMLECK KIURA MURATHI.....2<sup>ND</sup> PETITIONER**

**PETER S.N. MACHAI.....3<sup>RD</sup> PETITIONER**

**ABIJAH WARUGURU.....4<sup>TH</sup> PETITIONER**

**REV. HOSEPH MURAGE.....5<sup>TH</sup> PETITIONER**

**PATRICK MWANIKI.....6<sup>TH</sup> PETITIONER**

**HENRY NYAGA.....7<sup>TH</sup> PETITIONER**

**DAVID MUTHIKE GACHOKI.....8<sup>TH</sup> .PETITIONER**

*VERSUS*

**CABINET SECRETARY MINISTRY OF LAND**

**HOUSING& URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIRINYAGA...2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF EMBU.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION (NLC).....4<sup>TH</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION (IEBC).....5<sup>TH</sup> RESPONDENT**

HONOURABLE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT

NATIONAL IRRIGATION BOARD (NIB).....7<sup>TH</sup> RESPONDENT

KENYA AGRICULTURAL, LIVESTOCK &

RESEARCH ORGANIZATION (KALRO).....8<sup>TH</sup> RESPONDENT

AND

EMBU/MWEA RANCHING CO-OPERATIVE

SOCIETY LIMITED.....INTERESTED PARTY

FREDRICK MWANIKI NYAGA.....INTERESTED PARTY

MARGARET MATHURI NGONDI.....INTERESTED PARTY

JONATHAN NJERU.....INTERESTED PARTY

JEREMIAH WARUI.....INTERESTED PARTY

ANTHONY NJUE.....INTERESTED PARTY

MARTIN MBUTU.....INTERESTED PARTY

GICHOVI IRERI GICHINDANO.....INTERESTED PARTY

MBEERE ELDERS ADVISORY WELFARE

GROUP (NGOME).....INTERESTED PARTY

NJERU BANDA.....INTERESTED PARTY

ESTON NYAGA NTHIGA.....INTERESTED PARTY

SERAPHINO NGARI .....INTERESTED PARTY

RULING

1. By a petition dated 8.02.2017 and filed on 9.02. 2017 the Petitioners, who described themselves as adults of sound mind hailing from Kirinyaga County, sought the following reliefs against the Respondents,

*a) A declaration that the suit property otherwise known as Mwea Trust Land/Mwea Settlement is the legitimate property of the Petitioners herein, through the 2<sup>nd</sup> Respondent.*

*b) In the alternative and without prejudice to (a) above A Declaration that the suit property otherwise known as Mwea Trust land/Mwea Settlement Scheme is subject to proper adjudication and/or demarcation in line with the Constitution and laws of Kenya.*

*c) Pursuant to no (b) above, an Order of this Honourable Court directing that, a suitable adjudication and demarcation exercise be jointly carried out by officials from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or such other relevant government agency, in line with the report, deliberations, recommendations and/or resolutions of the Senate, vide its report of March 2016.*

*d) A further Declaration that the suit property otherwise known as Mwea Trust land/Mwea Settlement Scheme is public land in terms of Article 62 of the Constitution of Kenya 2010 and as such, vests in the 2<sup>nd</sup> Respondent on behalf of the petitioners and/or residents of the 2<sup>nd</sup> Respondent.*

*e) In the alternative and without prejudice to (3) above, A further Declaration that the suit property otherwise known as Mwea Trust Land/Mwea Settlement Scheme is community land in terms of Article 63 of the Constitution of Kenya 2010 and as such, vests in the Petitioners and/or members of KirinyagaMihirigaKenda.*

*f) A Declaration by this Honourable Court to the effect that, the deliberations, findings, recommendations and/or resolutions of the Senate, vide its report of March 2016, is legitimate and binding and as such, be upheld and/or enforced by suitable orders of this Honourable Court.*

*g) A Permanent and/or Perpetual Injunction at the close of this suit, forever restraining the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents respectively from encroaching, selling, transferring, alienating, charging, mortgaging or in whatsoever manner disposing off the suit properties known as Mwea Trust Lands or Mwea Settlement Scheme i.e LR Mwea/Tebere 1314 in whatsoever manner, permanently or in the future.*

*h) An Order for Cancellation or Revocation or Annulment of all Title Deeds or all other title documents, already issued in respect of the suit property or portions thereof.*

*i) That the costs of this Petition be provided for.*

*j) Any other equitable relief that this Honourable Court may deem fit and just to grant in the circumstances.*

2. The Petitioner stated in their petition that they were instituting the petition on their own behalf and as members of what they called the Kirinyaga *Mihiriga Kenda*. The Petitioners also framed about 16 questions or issues for determination.

3. It would appear that the main issue for determination is the status of all that parcel of land commonly known as Mwea Trust Land or Mwea Settlement Scheme. The said scheme is currently located within Embu County whereas the Petitioners hold the view that the land historically belonged to Kirinyaga County . They are also aggrieved by the manner in which land adjudication was being undertaken as they allege that about 600 of their members were left out of the allocation process and 2000 strangers introduced to replace them.

4. At the time of filing the said petition, the Petitioners also filed an application dated 8.02. 2017 under certificate of urgency for interim orders of injunction. It was disclosed in the said application that there were other proceedings or petitions which were pending in court to which the petitioners were not parties which related to Mwea Trust land or portions thereof. Some of those petitions were ELC Petition Nos. 2,3 and 6 of 2017.

5. The record shows that the 1<sup>st</sup> and 6<sup>th</sup> Respondents filed grounds of objection to the said application for interim relief raising the following grounds of objection;

*a) The issues raised in this petition were identical to the matters raised in Embu Petition No 2 of 2016 and Kerugoya Petition No. 3 of 2016.*

*b) The process of adjudication and allocation of the suit property was above board and sanctioned by the court in Embu ELC No. 1 of 2014.*

*c) The petition makes allegations of fraud, illegality and misrepresentation which matters cannot be resolved through affidavit evidence only.*

*d) That some of the issues raised relate to the extent of County boundaries, introduction and collection of local taxes and political representation which fall outside the jurisdiction of this court.*

*f) It was frivolous, vexatious and an abuse of the court process.*

6. The record further reveals that the 3<sup>rd</sup> Respondent is the only respondent which filed a replying affidavit to the Petitioner's said application for interim relief. The affidavit was sworn by Wilson Gitonga Ileri who described himself as acting County Secretary of the County Government of Embu.

7. The 3<sup>rd</sup> Respondent stated that the Petitioners were busybodies who had no legal right to represent a large unregistered group which they called *Mihiriga Kenda* or the 9 Agikuyu Clans. It was stated that the property described as L.R. NO. MWEA/TEBERE/1314 did not exist in law since its title had been surrendered and the land subdivided into 3 blocks out of which only one block commonly known as Mwea Trust Land or Mwea Settlement Scheme was in dispute.

8. It was further stated that pursuant to a court order made in ELC Petition No. 1 of 2014, the land comprised in the said Mwea Settlement Scheme was surveyed, demarcated and allocated to communities entitled and relevant titles issued.

9. It was the 3<sup>rd</sup> Respondent's case that the subject matter of this petition was also the subject matter in Kerugoya ELC No. 119 of 2013

where the 2<sup>nd</sup> Petitioner herein was a party and where a judgment was rendered in favour of representatives of the **Mihiriga Kenda**. It was contended that the instant petition was **res judicata** and an abuse of the court process.

10. It was also contended that there are earlier suits and petitions pending before this court on the same subject matter namely, ELC Petition Nos. 2.3 and 6 of 2016 as well as Kerugoya ELC No. 71 of 2014.

11. The 3<sup>rd</sup> Respondent contended that the court had no jurisdiction to entertain matters relating to a boundary dispute between counties, political representation, introduction and collection of taxes and other matters of a political nature.

12. It was finally submitted that the Petitioners had failed to satisfy the requirements for the grant of an interlocutory injunction sought as set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358**.

13. The 8<sup>th</sup> Respondent filed general grounds of opposition to the said applications stating that the application was frivolous, irregular, misconceived and an abuse of the court process. It was further contended that the Petitioners had not demonstrated that substantial loss may result unless the interim orders are granted.

It was also contended that the 8<sup>th</sup> Respondent was not a necessary party to the petition in view of the evidence on record.

14. When the Petitioner's said application was listed for hearing on 01.11.2017 most of the parties were not ready to proceed hence they requested for more time to prepare and file their responses. It was consequently agreed that the said application be disposed of through written submissions. The Respondent and interested parties were given 30 days to file and serve their responses. The Petitioner's were to file and serve written submissions within 30 days after service whereas the Respondents and interested parties were to file their respective submissions within 30 days thereafter. The matter was thereupon fixed for ruling on 01.03.2018.

15. By the time of preparing this ruling, however, none of the parties had filed any submissions. The record also shows that only the 3<sup>rd</sup> Respondent had filed a replying affidavit. The 1<sup>st</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Respondents and the 1<sup>st</sup> Interested party filed grounds of opposition only. The court shall, therefore, determine the said application on the basis of the material on record only without the benefit of submissions of the parties.

16. The court shall first deal with the competency of the petition itself in view of the existence of previous and pending proceedings relating to the suit property herein i.e LR NO. MWEA/TEBERE/1314. The 3<sup>rd</sup> Respondent contends that the instant petition is both **res judicata** and **sub judice**.

17. The court has perused the judgment in Kerugoya ELC No. 119 of 2013 delivered by the Hon. Justice Boaz Olao on 31.07.2014. The opening paragraph of the said judgment states as follows,

“The plaintiffs herein suing as the representatives of Ugaciku, Unjiru, Ucea, Ungui, Uithirandu, Uikakamuyu, Ukiuru, Ungari, ugathigia and Umbui clans collectively known as Kirinyaga Mihiriga Kenda filed this suit against the Government of Kenya seeking the following reliefs:-

**a) A declaration that the Government of Kenya holds L.R MWEA/TEBERE/1314 in trust for the plaintiff.**

**b) That the aforesaid trust be determined and the land do revert back to the plaintiff.**

**c) That the court be pleased to issue such further and or better orders as the court may deem fit and just.**

**d) Costs of this suit.”**

18. According to the said judgment, the clans known as **Mihiriga Kenda** claimed ownership of the suit property on the basis that the said land was given by the clans to the Government in 1962 on condition that the land would revert to them once the Government was done with the research project of growing rice which was to last for 20 years only.

19. The said judgment indicates that the Government of Kenya did not defend the suit hence it proceeded ex parte and judgment was consequently entered for the Plaintiffs as prayed in the plaint.

20. It is, therefore, evident to me that the **Mihiriga Kenda** clans on whose behalf Kerugoya ELC No. 119 of 2013 was filed is the same **Mihiriga Kenda** on whose behalf the instant petition was filed. A perusal of the grounds upon which the Notice of Motion dated 08.02. 2017 is based reveals that the Petitioners are members of the 9 Agikuyu clans (**Mihiriga Kenda**) resident in Kirinyaga County and that the suit property is part and parcel of their “historical” and “ancestral” land.

21. The court has noted that the representatives who filed the earlier suit in the ELC at Kerugoya on behalf of **Mihiriga Kenda** are different from the ones who filed the instant petition except for Elijah Njeru Gachoki who appears in both proceedings.

22. The requirement for the application of **res judicata** are set out in section 7 of the Civil Procedure Act as follows:-

**“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.”**

23. Explanation No. 4 to the said section makes it clear that any matter which ought to have been raised in the previous proceedings shall also be deemed to have been in issue in the previous suit. A party is not allowed to litigate by installments otherwise there shall never be an end to litigation on a particular subject matter.

24. In the case of **Kamunye & Others v The Pioneer Assurance Society Ltd (1971) E.A. 263**, the test for **res judicata** was stated as follows:-

**“The test whether or not a suit is barred by res-judicata seems to me to be- is the plaintiff in the second suit trying to bring before the court, in another way and in another form a new cause of action, a transaction which he has already put before a court of competent jurisdiction and which has been adjudicated upon.**

**If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at time.”**

25. The rationale for the doctrine of **res judicata** was considered in the case of **Njue Ngai v Ephantus Njiru Ngai & Another (2016) eKLR** as follows:-

“In the case of **Likay Estate Ltd & Another v Shah Hiri Monak & 2 Others (2006) eKLR** (supra) cited by the appellant, Waki JA stated as follows;

**“The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality of litigation and to prevent harassment of individuals twice over the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.”**

26. As indicated earlier in this ruling, the real claimants on whose behalf the previous suit and the instant petition was filed are members of the 9 Agikuyu clans, **Mihiriga Kenda**. In the earlier suit, they sought a declaration that the suit property belonged to them and that the Government was merely holding the land in trust for them. They wanted the trust to be terminated. Their prayers were granted by the court vide a judgment dated 31.07. 2014. They stated in their petition that the said judgment remains unsatisfied to date.

28. In the instant petition, the Petitioners seek various prayers including a declaration that the suit property belongs to the **Mihiriga Kenda**. It is evident from the petition that they have expanded the scope of prayers by including other matters such as a fresh adjudication of the suit property. In my view, the 9 clans had every opportunity to raise and canvass all issues relating to the adjudication, demarcation and allocation of the suit property in the previous suit.

29. The court notes that one of the reliefs sought was “such further and or better orders as the court may deem fit and just.” It is not clear from the judgment whether the said plaint was ever amended to specify these further or better reliefs. It was the claimants’ duty to do so. However, the judgment rendered by the court simply granted judgment as prayed in the plaint. So, if the Petitioners lost any opportunity for relief under the generic phrase of “such further and or better” orders they can only blame themselves.

30. In the case of **E.T. v Attorney General & Another (2012) eKLR** the Hon. Justice D. Majanja made the following observations on the doctrine of **res judicata**;

**“57 The court 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 a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs 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 vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) were 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 come to court, then I do not see the use of the doctrine of res judicata..”*

***58. In my view the addition of the Attorney General and the exclusion of the Petitioner’s mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as a party to evade the general principle.”***

31. The court is, therefore, of the opinion that the petition herein is barred under the doctrine of **res judicata**. The change of strategy in the choice of persons who were sued cannot displace the application of the doctrine of **res judicata**. Whereas in the earlier suit the Attorney General was sued on behalf of the Government of Kenya, the Petitioners chose to sue various Government agencies in the instant petition. For good measure, they slotted in the two County Governments of Embu and Kirinyaga on account of the alleged boundary dispute between them. In my view, none of these strategies have succeeded in sufficiently disguising the nature of the dispute and the subject matter of the dispute. **Res judicata** still applies within the meaning of the test in the case of Kamunye & Others vs The Pioneer Assurance Society Ltd (supra).

32. The second issue which was raised by the Respondents relates to the jurisdiction of the Environment and Land Court to grant some of the reliefs sought in the petition. In para 23 of the Petitioners’ affidavit in support of the petition, they state that:-

“23. THAT I further believe that the dispute between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with regards to the subject matter adverted to herein, goes to the root of the following questions/issues and related matters namely;

***i. Actual boundary extent/limit between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.***

***ii. Introduction and collection of taxes and other levies.***

***iii. Land ownership by residents of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.***

***iv. Political representation of residents of either of 2 said counties.***

***v. Legislative making process.***

***vi. Administration and other county government services liable to be rendered by either of the two counties.***

33. The court is of the view that only the land question enumerated in (iii) above would fall within the jurisdiction of the court under the provisions of section 13 of the Environment and Land Act 2011. The rest of the issues would fall for determination in a different forum. However, since the petitioners have not sought any reliefs on the basis of those questions in the petition, nothing really turns out on this issue.

All the 10 reliefs sought in the petition relate to the suit property known as Mwea Settlement Scheme which this court holds ought to have been canvassed and determined in the previous suit.

34. In view of my finding and holding that the instant petition is **res judicata**, it is not necessary to make any determination on the petitioners’ application for interim orders.

In the circumstances of this case the court, finds that both the petition and Notice of Motion dated 8 February 2017 are not tenable in law. Accordingly, they are hereby struck out with costs to the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents who participated in the proceedings.

35. It is so decided.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1<sup>st</sup> DAY OF March 2018.**

In the presence of:- Mr. Kathungu for the 5<sup>th</sup> Respondent and holding brief for Mr. Ireri for the 3<sup>rd</sup> Respondent, Mr. Ombachi holding brief for Mr. Guantai for the 1<sup>st</sup> interested party and holding brief Mr. Guantai for the 2<sup>nd</sup> interested party and in the absence of the Petitioners and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents.

**Y.M. ANGIMA**

**JUDGE.**

**01.03.2018**