



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 332 OF 2015 (O.S)**

**ALEX TONNY GITONGA NJERU**

**MARY GORETTI WANJA**

**GRACE HELLEN MUTHONI**

**JOHN NYAGA KIBOKO**

**ANGELO NJAGI BONIFACE**

**ANSELIMO KATHUNI NJERU**

**CHARLES NJUE NJERU**

**SAMUEL MUNENE NJERU**

**ROSE EVERLYN NJOKI**

**ANN WAWIRA**

**BETTY NJAGI**

**LAWRENCE MUNYI**

**BONIFACACE NJERU**

**PHILIP NJERU KARO**

**DENNIS MUGABI NJERU**

**ALFRED MURIITHI NJAGI**

**ANTHONY NJAGI**

**MARGARET M. NJAGI**

**MARGARET WANYAGA**

**LUKA MUNYI NJAGI.....PETITIONERS/APPLICANTS**

**VERSUS**

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

AND

NDWIGA WAINAINA

PETER NTHIGA

NJERU KARIUKI

ANASTACIA MUNYI (SUING AS THE REPRESENTATIVE OF TARACISIO KAMANJA

TARACISIO MWANGI

FERDINARD NYAGA

THOMAS NJERU

FELISTA IKAMBA (SUING AS THE REPRESENTATIVE OF SILVERIA NYAGA)

JOHN NYAGA

MBUGUA CHARAGU

NJUE CHARAGU

FEDINARD NJIRU WAINAINA.....INTERESTED PARTIES/RESPONDENTS

### RULING

This is in respect to the Applicant's Notice of Motion dated 13th June 2016 seeking the following main orders:-

*1. Spent*

*2. Spent*

*3. Spent*

*4. That a prohibition order be issued restraining all dealings with land parcel No. GATURI/NEMBURE/3072 at Embu Land Office and the status quo on the ground be maintained pending the hearing and determination of this suit.*

*5. Costs be provided for.*

The application is based on the grounds set out therein and is supported by the affidavit of **ALEX TONNY GITONGA NJERU** the 1st petitioner herein sworn with the authority of the other petitioners in the Originating Summons. It is the applicant's case that they reside on the parcel No. GATURI/NEMBURE/3072 (the suit land) which is held in trust by the respondent since 1964 on their behalf as members of the **MUTHIGA CLAN**. The applicants are however apprehensive that the respondents intend to dispose off the suit land thereby defeating their interest therein hence the need to issue a prohibitory order.

The respondents **COUNTY GOVERNMENT OF EMBU** did not file any response to the application. However, the interested parties through **NDWIGA WAINAINA**, the 1st interested party herein, filed a replying affidavit in which it was deponed, inter alia, that this matter has infact been the subject of

litigation in **NYERI HIGH COURT CIVIL CASE No. 201 of 2000 (later NYERI ELC CASE No. 700 of 2014)** which was determined by consent and therefore this suit is res-judicata and this Court has no jurisdiction to grant any order.

Submissions have been filed both by **ANNE THUNGU advocate** for the applicants and **WANGARI advocate** for the interested parties.

I have considered the application, the rival affidavits and the submissions by counsel.

The applicants seek that orders of prohibition be issued restraining any dealings with the suit land. The response by the interested parties is that this suit is res-judicata. The **COUNTY GOVERNMENT OF EMBU** who are the respondents herein and in whose names the suit land is registered did not file any response to the said application. That can only mean that they have no opposition to the orders sought by the applicants. On the issue of res-judicata, I delivered myself as follows in a previous ruling dated 9th June 2016.

*“Although this Court has been addressed on the issue of res-judicata, all that the interested parties did was to avail the judgment in those previous cases. To enable the Court make an informed decision on res-judicata, the pleadings would be useful. I am afraid not much was placed before this Court to help it determine whether in fact this suit is res-judicata and that decision must be left for another forum”.*

In that same ruling, I delivered myself as follows:-

*“Looking at the Originating Summons and the submissions by the interested parties herein, the main complaint is that this suit is res-judicata. However, as I have already observed above, it is clear that the suit land has been the subject of other litigation. This Court cannot in the absence of the full benefit of those previous pleadings, be in a position to make any useful determination of res-judicata. The doctrine of res-judicata involves many components and an order from a previous suit may not itself satisfy a Court that the issues are res-judicata”.*

The forum in which the issue of res-judicata can now be exhaustively addressed has now come because the replying affidavit of **NDWIGA WAINAINA** has annexed thereto sufficient material to enable me address that issue. This is un-like the rather scanty replying affidavit of **RAYMOND NJAGI KINYUA** the respondent’s Country Secretary which I relied on in my previous ruling and which I found did not mention the existence of **NYERI H.C.C.C No. 201 of 2000**. Although counsel for the applicants has submitted that I had in my ruling dated 9th June 2016 already ruled that this suit is not res-judicata, it is clear from the above that I did not in fact do so but left that issue to be determined in another forum.

I intend to address that issue now.

Res-judicata is provided for under **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”.*

It is clear that before a plea of res-judicata can be properly raised and up-held, the issues in dispute in the former suit must be directly and substantially in dispute between the same parties or parties under whom they or any of them litigate, the former suit must have been heard and finally determined by a competent Court. In **HENDERSON VS HENDERSON (1843) 67 E.R. 313**, the Court described the doctrine in the following words:

*“... where a given matter becomes the subject of litigation in and adjudication by a Court of*

*competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.....”*

The rationale behind the doctrine of res-judicata is that it is in the public interest for litigation to come to an end so that parties are not continuously vexed over disputes that have long been determined through the judicial process by a competent Court.

I have now gained sight of the orders in **NYERI H.C.C.C No. 201 of 2001 (later NYERI ELC CASE No. 700 of 2014)**. The parties therein were **NDWIGA WAINAINA & OTHERS** (who are the interested parties herein), as plaintiffs, and the **EMBU COUNTY COUNCIL & ANOTHER** (who are the respondents therein), as the defendants. The dispute involved the same land subject of this petition and **J.V.O. JUMA J.** (as he then was) referred it to arbitration by the Provincial Commissioner Eastern Province on 7th May 2002. An award was filed in the High Court at Nyeri and was adopted as a judgment of the Court on 1st August 2003. The import of that judgment was that the **EMBU COUNTY COUNCIL** and all other persons occupying the suit land were ordered to be evicted therefrom. Further orders were issued by **OMBWAYO J.** on 18th July 2014 directing that all cautions lodged on the suit land be removed and that the same be transferred to the interested parties herein. A similar suit filed by **VICTOR ALLOYS NJAGI & OTHERS VS NDWIGA WAINAINA & OTHERS** being **EMBU H.C.C.C No. 14 of 2004** also involving the same suit land was struck out in a ruling delivered by **ONG’UDI J.** on 31st July 2012. In all those cases, the petitioners herein were not parties. A plea of res-judicata cannot therefore be sustained to defeat their petition with respect to the suit land and they should therefore be allowed to prosecute this petition. Whether or not they will make out a case for the grant of the orders sought in that petition is of course a matter for the trial Court. The plea of res-judicata raised by the interested parties is therefore dismissed.

I will therefore consider the petitioners’ application for prohibitory orders on its merits. **Section 68 (1) of the Land Registration Act 2012** donates to the Court the powers to grant orders of prohibition. It states that:

*“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.*

An order of prohibition or inhibition is similar to a temporary injunction for it prohibits the registered owner of property subject of a dispute from registering any dealings on the same until the dispute is determined or until the Court granting the said orders decides otherwise. Before issuing such an order, the Court must be satisfied that the applicant has good grounds for that order to be granted, that the property is at risk of being alienated to the applicant’s detriment, that the applicant’s suit would be rendered nugatory unless the order is granted and also the prejudice likely to be caused to the other party. As I have already indicated above, the **COUNTY GOVERNMENT OF EMBU** who are the respondents herein and in whose name the suit land is registered, did not file any replying affidavit or grounds of opposition to the petitioners’ application for prohibitory orders. The petitioners’ claim that they are in occupation of the suit land has therefore not been rebutted. The only serious objection raised by the interested parties being that of res-judicata which I have considered and dismissed. Being parties in occupation of the suit land, it is in the interest of justice that the same be preserved while their interests therein are investigated. If that is not done and the suit land is alienated, as would have happened if the consent order dated 16th October 2015 was not set aside, then their petition may be rendered nugatory. I do not see what prejudice will be caused both to the interested parties and the respondents if the order of prohibition is granted. After all, the respondents in whose name the suit land is currently registered did

not bother to file any response to the application.

Ultimately therefore, and upon considering the petitioners/applicants' Notice of Motion dated 13th June 2016, I allow it in the following terms:-

***1. A prohibitory order is hereby issued restraining all dealings with land parcel No. GATURI/NEMBURE/3072 and the status quo obtaining on the said land be maintained pending the hearing and determination of this petition.***

***2. Costs in the cause.***

**B.N.OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**

Ruling dated, delivered and signed in open Court this 3<sup>rd</sup> day of March 2017

Mr. Macharia for Ms Ann Thungu for Petitioners present

No appearance by the Respondent though notified on 24th February 2017.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**