



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mberia v Mbui & 4 others (Civil Appeal 177 of 2020)  
[2025] KECA 1000 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 1000 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 177 OF 2020  
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA  
MAY 9, 2025**

**BETWEEN**

**DR WILLIAM GACANI MBERIA ..... APPELLANT**

**AND**

**CHARLES KIRIMI MBUI ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR MERU CENTRAL ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE DISTRICT SURVEYOR MERU CENTRAL ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

*(An appeal from the Ruling of the High Court at Meru (Mbugua, J.) delivered  
on 30th September 2020 in HC. Constitutional Petition No. 6 of 2020)*

**JUDGMENT**

1. In a constitutional petition dated 21<sup>st</sup> April 2020, the appellant sought for several orders including; a declaration that parcels Nos. Ntirimiti Settlement Scheme/417, 484 and 2109 remain unchanged as it appeared in the original registry map record; a declaration that the decision of the District Land Registrar dated 26<sup>th</sup> July 2016 is null and void; an order directing the 3<sup>rd</sup> respondent to establish the beacons for the access road on the ground according to the original map; a permanent injunction restraining the 1<sup>st</sup> respondent from trespassing, occupying, encroaching or in any way infringing on the appellant's proprietary interest in Ntirimiti Settlement Scheme/417, and cost of the petition.
2. In opposition to the petition, the 1<sup>st</sup> respondent filed a notice of preliminary objection dated 8<sup>th</sup> June 2020 on the grounds that the court lacked jurisdiction under the doctrine of res judicata in light of the



judgment in Meru ELC Suit No. 151 of 2016, that the case is vexatious and constitutes an abuse of the court's process, and that it warrants immediate dismissal.

3. On hearing the parties on the issues raised in the preliminary objection, the court determined that in ELC Suit No. 151 of 2016, the issue of whether the issue between the parties was a boundary dispute or a trespass claim was resolved. The court was also of the view that if the appellant was aggrieved by the outcome of ELC Suit No. 151 of 2016, the proper course of action would have been to challenge the court's decisions through the appellate system rather than attempting to reopen litigation under the guise of a constitutional petition. Ultimately, the court found merit in the preliminary objection striking out the petition with costs to the 1<sup>st</sup> respondent.
4. The appellant, aggrieved by the ruling preferred this appeal raising four (4) grounds of appeal in his memorandum dated 24<sup>th</sup> November 2020, stating that the learned judge erred in law: in finding that the constitutional petition is res judicata given the ruling in Meru ELC No. 151 of 2016; failing to recognize that Meru ELC No. 151 of 2016 was struck out and not determined on merit; failing to find that the appellant had a valid constitutional claim against the 2<sup>nd</sup> to 5<sup>th</sup> respondents regarding the issue of constructing a road on land without compensation and in determining the matter against the weight of the material on record.
5. Learned counsel for the appellant filed submissions dated 24<sup>th</sup> October 2024. He outlined the essential elements of res judicata as codified in section 7 of the *Civil Procedure Act*. He submitted that in Meru ELC No. 151 of 2016, a preliminary objection was raised, leading to the matter being disposed of based on that objection. The substantive issues of the suit were not considered or addressed, as required by section 7 of the Act. Therefore, the doctrine of res judicata would not apply since the parties were not heard, and evidence was not presented in court, meaning that the court did not resolve the case on merit, and a final judgment was never delivered. Meru ELC No. 151 of 2016 is still pending a hearing and determination on the counterclaim by the respondent. Further, section 7 of the *Civil Procedure Act* does not apply to matters resolved on technicality. Further he urged that the section does not address itself to a situation where a matter is determined on a technicality such as where a preliminary objection is raised, followed by the filing of a subsequent suit. Counsel in support relied on the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.
6. Learned counsel further cited the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR), where this Court stated that in deciding what questions of law and fact were determined in the earlier judgement the court is entitled to look at the judge's reasons for his decision and his notes of the evidence.
7. On whether the petition was vexatious and an abuse of the court process, learned counsel contended that the question would be determined by examining the petitioner's conduct. The petitioner disclosed all material facts surrounding the issues for determination, including the existence of the earlier suit, and had acted in utmost good faith. He placed reliance on the case of Dorine Akula vs APA Insurance Company Limited [2016] eKLR, where the court cited KCB vs Suntra Investment Bank Ltd [2015] eKLR:

“The term abuse of the Court process connotes that the process of the Court must be carried out properly and honestly and in good faith, and it means that the Court will not allow its functions as a Court of law to be misused.”
8. In opposing the appeal, the 1<sup>st</sup> respondent's learned counsel filed submissions dated 20<sup>th</sup> September 2024. He argued that the doctrine of res judicata applies where the issue in the initial lawsuit was resolved; the matter in dispute in the previous case must be directly or substantially related to the



current dispute between the parties and the parties involved in the previous lawsuit must be the same or claim under those parties to litigate the same issue. He cited the case of *E.T. v Attorney General & Another* [2012] eKLR.

9. Learned counsel for the 1<sup>st</sup> respondent argued further that the issue raised in the Constitutional Petition No. 6 of 2020 is essentially a boundary dispute that has been presented as a constitutional claim. The issues raised in the petition closely mirrored those addressed in ELC No. 151 of 2016, as the matters are identical and fall under the jurisdiction of the Land Registrar. In ELC No. 151 of 2016, the boundary dispute was resolved through a ruling delivered on 13<sup>th</sup> November 2019. Consequently, the appellant filed a new petition concerning the same subject matter, which was dismissed on preliminary objection. The court found that the petition was *res judicata*, pursuant to section 7 of the [Civil Procedure Act](#). He cited the case of *Edward Karanja Chogo & 2 Others vs County Government of Kakamega* [2018] eKLR, where the court observed that; -

“ A constitutional petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim...”

10. The 2<sup>nd</sup> to 4<sup>th</sup> respondents filed submissions dated 28<sup>th</sup> October 2024. Learned counsel relied on the Supreme Court decision in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others* (supra) and the case of *Wycliffe Gisebe Nyakina vs Attorney General & Another* (2014) eKLR, where he urged that though the courts in constitutional litigation must apply the principle of *res judicata* sparingly, courts must also be vigilant to guard against litigants who are evading the doctrine of *res judicata* by introducing new causes of action to seek the same remedy before the same court.
11. Regarding whether the appellant's petition presents a valid constitutional claim, learned counsel contended that parties must present their cases or complaints with precision, as established in the landmark case of *Anarita Karimi Njeru v The Republic* [1979] eKLR. He further contended that, aside from referencing vague constitutional provisions, the appellant's petition lacks specific details about the alleged grievances and does not clearly outline how the alleged infringements occurred.
12. This being a first appeal, it is our duty in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in the case of *Ng'ati Farmers' Co-Operative Society Ltd. v Ledidi & 15 Others* [2009] KLR 331 where the court stated:

“ An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. We have carefully considered the pleadings, the submissions made by counsel for the parties, the respective authorities cited, and the law, and are of the considered view that two issues call for our consideration: whether the appellant placed before the court a valid constitutional petition and whether the issues raised in the constitutional petition were *res judicata*.



14. Other than referring to Articles 40, 64, 67, 162(2)(b) and 165(5)(b) of *the Constitution* in the heading, the appellant did not set out with clarity in the petition the provisions said to be infringed upon, his complaint regarding the said Articles, and how they were infringed. Courts have emphasized times without number that not all complaints are constitutional, and not all wrongs qualify or can be christened as raising constitutional issues. Constitutional litigation is not a panacea for all litigation, as there are various avenues of litigation available to parties.

15. In the locus classicus case of Anarita Karimi Njeru (*supra*), the court stated as follows: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

16. This Court further stated in *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority & Another* (Civil Appeal 67 of 2015) [2016] KECA 411 (KLR):

“...constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

17. In paragraphs 5, 6 and 7 of the petition, the appellant stated that the 1<sup>st</sup> respondent encroached upon his land Ntirimiti/Settlement/417 in 2016. When he protested, the 1<sup>st</sup> respondent raised a complaint with the 2<sup>nd</sup> respondent on the grounds that there was a boundary dispute. Yet, the issue was one of trespass, and the 2<sup>nd</sup> respondent was misled into making a finding without the input of the 3<sup>rd</sup> respondent, resulting in an error. He said that he had sued the 2<sup>nd</sup> and 3<sup>rd</sup> respondents so that they could rectify the anomaly. He further stated that ELC Suit No. 151 of 2016 was dismissed on a technicality.

18. From the petition, the appellant’s case involves issues that ought to be litigated in a civil suit. In his own words, he claimed that the 1<sup>st</sup> respondent trespassed on his land and that the issue between them was wrongly referred to the 2<sup>nd</sup> respondent as a boundary dispute. The 2<sup>nd</sup> respondent acted on misinformation, leading to the demarcation of a boundary. On the other hand, the 1<sup>st</sup> respondent agrees that the matter does not raise constitutional issues; it involves a boundary dispute that the 2<sup>nd</sup> respondent resolved upon receiving a complaint from the 1<sup>st</sup> respondent. When the issue is one of trespass, wrong placement of a boundary, or even boundary dispute, these are all issues for a normal civil suit.

19. On the second issue, it is correct from the pleadings that ELC No.151 of 2016 was dismissed on a technicality. The question is whether the matter was dealt with conclusively. In *E.T. v Attorney General & Another* (*supra*), the court held: -

“The courts must always be vigilant to guard against 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 is in the second is trying to bring before the court in another way and in a 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...’

20. The Supreme Court on this subject of res judicata had this to say in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others (supra):

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

21. A preliminary objection can conclusively determine a matter if it raises a pure point of law which, if resolved in favour of the opponent, would render the rest of the proceedings unnecessary or impossible. This was the case in ELC No.151 of 2016. Once the court found that the issue was one of boundaries, it rightly found that it had no jurisdiction. As stated by the Supreme Court in the John Florence Maritime Services Limited case (supra), the doctrine of res judicata serves the cause of order and efficacy, prevents a multiplicity of suits as has happened between the parties herein and ought to bring litigation to an end. This matter was well and fully determined by the Land Registrar. It must now come to an end. Indeed, the ELC No. 151 of 2016 was appealed against in Civil Appeal No. 102 of 2020 before this Court, and the court agreed with the findings of the trial court.

22. In conclusion, the suit fails on all grounds. The petition in the High Court did not raise any constitutional issue and is res judicata on account of ELC No. 151 of 2016. The appeal is therefore dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

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**ALI-ARONI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed



**DEPUTY REGISTRAR.**

