



REPUBLIC OF KENYA



**Njeru & 19 others v County Government of Embu & 12 others (Civil Appeal
92 of 2020) [2024] KECA 1532 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 92 OF 2020
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 25, 2024**

BETWEEN

ALEX TONNY GITONGA NJERU 1ST APPELLANT
MARY GORETTI WANJA 2ND APPELLANT
GRACE HELLEN MUTHONI 3RD APPELLANT
JOHN NYAGA KIBOKO 4TH APPELLANT
ANGELO NJAGI BONIFACE 5TH APPELLANT
ANSELIMO KATHUNI NJERU 6TH APPELLANT
CHARLES NJUE NJERU 7TH APPELLANT
SAMUEL MUNENE NJERU 8TH APPELLANT
ROSE EVERLINE NJOKI 9TH APPELLANT
ANN WAWIRA 10TH APPELLANT
BETTY NJAGI 11TH APPELLANT
LAWRENCE MUNYI 12TH APPELLANT
BONIFACE NJERU 13TH APPELLANT
PHILIP NJERU 14TH APPELLANT
DENNIS MUGAMBI NJERU 15TH APPELLANT
ALFRED MURIITHI NJAGI 16TH APPELLANT
ANTHONY NJAGI 17TH APPELLANT
MARGARET M NJAGI 18TH APPELLANT
MARGARET WANYAGA 19TH APPELLANT



LUKA MUNYI NJAGI 20TH APPELLANT

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT

NDWIGA WAINAINA 2ND RESPONDENT

ANSTACIA MUNYI (SUIING AS THE REPRESENTATIVE OF TARACISIO
KAMANJA) 3RD RESPONDENT

NJERU KARIUKI 4TH RESPONDENT

PETER NTHIGA 5TH RESPONDENT

TARACISIO MWANGI 6TH RESPONDENT

FERDINARD NYAGA 7TH RESPONDENT

THOMAS NJERU 8TH RESPONDENT

FELISTA IKAMBA (SUIING AS THE REPRESENTATIVE OF SILVERIA
NYAGA) 9TH RESPONDENT

JOHN NYAGA 10TH RESPONDENT

MBUGUA CHARAGU 11TH RESPONDENT

NJUE CHARAGU 12TH RESPONDENT

FERDINARD NJIRU WAINAINA 13TH RESPONDENT

*(Being an Appeal from the judgment of the High Court of Kenya at Embu
(Y.M Angima, J.) dated 5th May 2020 in ELC NO. 332 of 2015 (O.S))*

JUDGMENT

1. The dispute before the Environment and Land Court (ELC) at Embu was between the Karukenya house and the Wainaina house, over land parcel Gaturi/Nembure/3072 (the suit property). The two houses, along with Ngondi house, Nyaga house and Kangari house, belong to Muthiga clan in Embu. The appellants Alex Tonny Gitonga Njeru, Mary Goretti Wanja, Grace Hellen Muthoni, John Nyaga Kiboko, Angelo Njagi Boniface, Anselimo Kathuni Njeru, Charles Njue Njeru, Samwel Munene Njeru, Rose Everlyne Njoki, Ann Wawira, Betty Njagi, Lawrence Munyi, Boniface Njeru, Phillip Njeru Karu, Dennis Mugambi Njeru, Alfred Muriithi Njagi, Anthony Njagi, Margaret M. Njagi, Margret Wanyaga and Luka Munyi Njagi belong to the Karukenya house while the 2nd to the 13th respondents (Ndwiga Wainaina, Peter Nthiga, Njeru Kariuki, Anastacia Munyi (suing as the representative of Taracisio Kamanja), Taracisio Mwangi, Ferdinand Nyaga, Thomas Njeru, Felista Ikamba (suing as the representative of Silveria Nyaga), John Nyaga, Mbugua Charagu, Njue Charagu and Ferdinand Njiru Wainaina) are members of Wainaina house.
2. By an originating summons dated 7th October 2015, the appellants sought the determination of the following questions:-
 - a. whether the County Government of Embu (the 1st respondent) was registered to hold the suit property in trust for Muthiga Clan;



- b. whether there is any good ground why the trust should not be determined and terminated;
 - c. whether the 1st respondent should transfer the suit property to the appellants for themselves and on behalf of Muthiga Clan; and
 - d. who shall pay the costs.
3. The summons was supported by the affidavit of the 1st appellant dated 7th October 2015 and annexures thereto. Their case was that the suit property belonged to the Muthiga Clan but had been registered in the name of the 1st respondent to hold in trust for the clan pending the resolution of the dispute regarding its rightful beneficiaries. They wanted the trust determined for the suit property to go to its rightful beneficiaries who were the appellants.
 4. The 2nd to 13th respondents were interested parties in the suit that the appellants filed against the 1st respondent. They responded to the summons through affidavits dated 26th August 2016 and 17th September 2019 stating that the dispute regarding who owned the suit property had been determined in their favour in disputes in which the appellants had participated; that the summons was an abuse of the process of the court and was *res judicata*.
 5. The learned Y.M. Angima, J. heard the summons and found as follows:-
 - a. the appellants' suit was *res judicata*, scandalous and an abuse of the court process in view of the previous cases on the same subject matter;
 - b. the 1st respondent was registered as proprietor of the suit property in trust for members of Muthiga Clan due to some disagreement amongst the beneficiaries. The intended beneficiaries were ultimately determined in Nyeri HCCC No. 201 of 2000 (now Nyeri ELC No. 700 of 2014) as the Wainaina family (house) of Muthiga Clan;
 - c. there was no need for an order for determination of the trust and distribution of the suit property to the rightful beneficiaries since those issues were determined in Nyeri ELC No. 700 of 2014;
 - d. costs of the appellants to the 2nd to 13th respondents.
 6. This is the judgment that aggrieved the appellants and which led them to come before us in this appeal. The grounds contained in the memorandum of appeal dated 9th July 2020 were as follows:-
 - “1. That the learned judge made judgment against the weight of evidence.
 2. That the learned judge erred in law and fact in failing to find that the suit was not *res judicata* since the appellants were not parties in Nyeri ELC Case No. 700 of 2014 (previously CC No. 201 of 2000).
 3. That the learned judge erred in law and fact in failing to find that, without prejudice to ground 2 hereabove, the suit was not *res judicata* by virtue of section 4(4) of the *Limitations of Actions Act*, Cap 22 of the Laws of Kenya.
 4. That the learned judge erred in law and fact in unfairly disregarding the evidence adduced on behalf of the appellants and the submissions made on their behalf.”



7. During the hearing of the appeal, the learned counsel Mr. Kimanzi represented the appellants, learned counsel Ms. Milkah represented the 1st respondent while learned counsel Mr. Githinji represented 2nd to 13th respondents. They had each filed written submission which they elected not to highlight.
8. It was submitted on behalf of the appellants that their suit was not *res judicata*; that it was not true that the claim over the suit property had been heard and determined in favour of the 2nd to 13th respondents by the courts in NBI HCC No. 1369 of 1970, Nyeri ELC No. 700 of 2014 (previously OS. 201 of 2000) and in Embu HCCC No. 14 of 2004. It was contended that the respondents had admitted that the appellants were not parties in ELC No. 700 of 2014 (previously OS. 201 of 2000), and their witness had admitted that the appellants were not parties in the cited case.
9. On the part of the 2nd to 13th respondents, it was submitted that the issues herein had been heard and determined in Nyeri ELC No. 700 of 2014 and Embu HCCC No. 14 of 2004.
10. After considering the record of appeal, the submissions by learned counsel, the cited authorities and the law, we discern that the issue for determination is whether the learned Judge was right in his finding that the originating summons dated 7th October 2015 raised issues that were *res judicata*.
11. In dealing with the question, we are mindful of the fact that an appeal to this Court from a trial by the ELC is by way of a retrial. We must reconsider the evidence that was placed before the ELC, evaluate it ourselves and draw our own conclusions thereon while being mindful that the ELC had the advantage of seeing and hearing the witnesses who appeared before it. (See *Gitobu Imanyara & 2 Others v Attorney General* [2016]eKLR.
12. Section 7 of the *Civil Procedure Act* (Cap. 21) provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
13. Further, Explanation 6 of section 7 of the *Act* states that:-

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”
14. In *Kenya Commercial Bank Ltd v Benjob Amalgamated Limited* [2017]eKLR it is observed as follows:-

“The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit.

 - a. The suit or issue 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.....”

15. In *IEBC v Maina Kiai & 5 Others* [2017]eKLR, this Court explained the role of *res judicata* as follows:-

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

16. The 2nd to 13th respondents submitted that the appellants on behalf of Karukenya house have notoriously filed many suits claiming the suit property, aggrieved that the 1st respondent was holding it in trust for the Wainaina house in which the 2nd and 3rd respondents belong; that the courts have always found in favour of the 2nd to 13th respondents, and therefore the suit contained in the originating summons was *res judicata*.
17. The record shows that the dispute between Karukenya house and Wainaina house over the suit property has a long history. The dispute existed even by 1970, but starting with Nyeri HC OS No. 201 of 2000, the 2nd to 13th respondents claimed to be beneficiaries of the trust that the 1st respondent held over the suit property; that, the 1st respondent was registered following a long-standing dispute amongst members of the Muthiga Clan. They sought the determination of the trust. On 25th August 2003, following a hearing, the court found that the suit property belonged to Wainaina house and asked that the members of Karukenya house who had lodged a caution against the land do remove the same and that the land be transferred by the 1st respondent to Wainaina house. There is no evidence that the decision was ever appealed against.
18. In Embu HCCC No. 14 of 2004 Victor Alloys Njagi and other members of Karukenya house, and who had been parties in Nyeri HCC OS No. 201 of 2001, sued the respondents claiming that the said land belonged to Karukenya house and that they had all along been living on it, and had not participated in Nyeri HCC OS 201 of 2000. They wanted the suit property to be transferred to them as they were the administrators of their house. The 2nd to 13th respondent filed a motion dated 5th November 2010 to state that the suit was *res judicata* to both Nyeri HC OS No. 201 of 2000 and Nairobi HCCC No. 1369 of 1970. The learned H.I. Ong’udi, J. delivered a ruling on 31st July 2012 in which she found that the suit was indeed *res judicata* with respect to Nyeri HC. OS No. 201 of 2000. There was no appeal.
19. In Embu ELC No. 332 of 2015 (OS), the appellants herein sued the 1st respondent claiming to be entitled to the suit property which the 1st respondent registered on 9th April 1964. The suit was compromised vide a consent rendered on 16th October 2015 between the appellants and the 1st respondent, in which the 1st respondent admitted that it was registered to hold the suit property on behalf of the appellants; that the trust be terminated and the land transferred to the appellant, etc. The 2nd to 13th respondents learnt of the consent and filed a motion dated 4th November 2015 to have it set aside on the basis that they were the owners of the suit property who had been fraudulently kept out of the case. The motion was heard and on 9th June 2016 a ruling was delivered setting aside the



consent. Justice B.N. Olao, J. observed that the parties to the consent knew about the previous suits and decisions over the suit property but had failed to disclose them to the court; that even the 1st respondent who, it had been decided, held the suit property for the 2nd to 13th respondents had mischievously participated in the consent to give the land to the appellants. It was found that the consent was null ab initio and was set aside.

20. So, when the appellants filed the instant originating summons against the respondents over the suit property, they were bound to be caught up by the plea that the suit was *res judicata* given what we have stated in the foregoing. The appellants, once again, came to court on their own behalf and on behalf of Karukenya house seeking to wrestle, as it were, the suit property from the 2nd to 13th respondent, on their own behalf and on behalf of Wainaina house. The land was registered in the name of the 1st respondent following a long-standing dispute between the two houses who belong to Muthiga Clan. The court had found that the suit property beneficially belonged to the Wainaina house as represented by the 2nd to 13th respondents. It had been determined that the trust held by the 1st respondent be determined and the land transferred to the Wainaina house through the 2nd to 13th respondent.
21. It is for these reasons that we determine that, the learned Judge was right in finding that the suit as contained in the originating summons dated 7th October 2015 by the appellants against the respondents was *res judicata*. In our determination, it was *res judicata* given the decision in Nyeri HC OS. 201 of 2000.
22. The consequence is that, the appeal has no merits and is dismissed with costs to be paid by the appellants to the 2nd to 13th respondents.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

