Njeri & 9 others v Kamau (Civil Appeal 74 of 2017)
[2022] KECA 34 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 34 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 74 OF 2017

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

LOISE NJERI ..... 1ST APPELLANT

PETER KARIUKI ..... 2ND APPELLANT

JOHNSON KARURU ..... 3RD APPELLANT

JAMES IRUNGU MACHARIA ..... 4TH APPELLANT

MWANGI GATHEYU ..... 5TH APPELLANT

PETER NDUNGU ..... 6TH APPELLANT

DAVID MAINA GICHINGIRI ..... 7TH APPELLANT

EUNICE NYOKABI MUIRURI ..... 8TH APPELLANT

MUTHIA KAHIGA ..... 9TH APPELLANT

JOHN NGUGI MUIRURI ..... 10TH APPELLANT

AND

JOSEPH MAINA KAMAU ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nyeri (L.N. Waithaka, J.) dated 26th May, 2016 in E.L.C No. 423 of 2014)

JUDGMENT

1. This is an interlocutory appeal arising from the Ruling of L. M. Waithaka, J. dated 26th May 2016 in Nyeri E.L.C No. 423 of 2014.

2. The background to the appeal albeit in summary is that Joseph Maina Kamau, the respondent herein filed a Notice of Motion dated 13th July, 2015 seeking to strike off the appellants' suit on the grounds that it was *res judicata.*

   He also prayed for costs in the cause.

3. The appellants opposed the respondent's application as appears from the replying affidavit of the 5th Appellant, Mwangi Gathaiyu, sworn on 9th September 2015. According to him, the suit was not res judicata as claimed by the respondent in view of the fact that "... there has never been any suit with the similar subject matter filed before any court of competent jurisdiction." He stated that "whereas some of the [appellants] were defendants in HCCC No. 252 of 1983, the subject matter of [that] case was totally different from the current suit." He therefore urged the court to dismiss the respondent's application with costs to the appellants.

4. The related series of suits and interlocutory applications on the basis of which the respondent anchored his plea of res judicata commenced way back in 1983 when the respondent's father, Kamau Ngure (Deceased), successfully sued one Muiruri Njoroge together with the 5th appellant (Mwangi Gatheyu) and the 9th appellant (Mbuthia Kahiga) in the High Court of Kenya at Nyeri Civil Suit No. 252 of 1983 seeking their eviction from LR No. Loc. 7/Maragua Ridge/50 measuring 44 Acres in the approximate, and part of which they allegedly occupied as licensees. The court gave judgment in favour of Kamau Ngure with orders that the defendants therein, their families, servants and/or agents be evicted from the parcel of land No. Loc. 7/Maragua Ridge/50. A decree with orders of eviction was issued on 1st October 1999.

5. The appellants allege that a certain plot No. 39A Maragua Ridge Settlement Scheme had been curved out of the suit property (LR No. Loc. 7/Maragua Ridge/50) and subsequently subdivided into Plots No. Loc. 7/Maragua Ridge/264-269. Even though the status of the suit property and of the alleged subdivisions of plot No. 39A are clear from the record before us, the appellants' claims in that regard are matters for determination by the trial court. We therefore refrain from expressing ourselves thereon lest we either preempt or embarrass the outcome of the trial court's proceedings.

6. Next in litigation followed Murang'a Senior Principal Magistrate's Court Civil Case No. 1 of 2000 (SPMCC No. 1 of 2000) in which the 5th appellant sued the respondent's deceased father seeking permanent injunction restraining the then defendant, Kamau Ngure (Deceased) from evicting him and his family from "Plot No. 28 Maragua Ridge. It is not clear to us how this particular plot relates to the respondent's LR No. Loc. 7/Maragua Ridge/50 or to any of the subdivisions of the alleged non-existent plot No. 39A aforesaid. Suffice it to observe that the said suit (SPMCC No. 1 of 2000) was struck out on 13th September 2002 for want of prosecution on application by the said Kamau Ngure (Deceased).

7. In 2002, the 5th appellant sued the respondent's deceased father, Kamau Ngure, in Thika Chief Magistrate's Court Civil Suit No. 476 of 2002 seeking compensation for loss and damage allegedly suffered as a result of demolition of certain structures erected on LR No. Loc. 7/Maragua Ridge/264 (one of the alleged subdivisions of the non-existent plot No. 39A). That suit was struck out on 15th March 2005 on account of failure to comply with mandatory requirements relating to pleadings and, in particular, in failing to disclose that there was in existence a suit pending before another court relating to the same cause of action.

8. In 2011, the 5th and 9th appellants filed an application to the Court of Appeal in Nyeri being Civil Application No. 230 of 2011 – Mwangi Gatheyu (the 5th appellant), Muiruri Njoroge and Mbuthia Kahiga (the 9th appellant) v Kamau Ngure (Deceased) seeking stay of execution of the Ruling of the

High Court of Kenya at Nyeri in HCCC No. 252 of 1983 delivered on 5th February 2010. That application was dismissed with costs to the respondent.

9. The following year, the appellants herein filed a suit at the High Court of Kenya at Nyeri Civil Suit No. 222 of 2012 against Kamau Ngure (Deceased) seeking a permanent injunction to restrain the defendant therein from "... trespassing, selling, advertising or offering for sale or in any other way interfering with the appellants' quiet possession of the parcels of land known as Maragua/Ridge/259-269". It is apparent from the record that these plots were also alleged to be subdivisions of the non-existent plot No. 39A claimed to be the suit property. Subsequently, this suit was transferred to the Environment and Land Court to become Nyeri E.L.C Cause No. 423 of 2014 in which the impugned Ruling was delivered dismissing the appellants' suit on the grounds that the same was res judicata. Hence this appeal.

10. It is noteworthy that the impugned Ruling makes reference to plot numbers 264-269. On the other hand, the District Land Registrar's letter of 6th May 2011 makes reference to "... plot No. 39A which produced plot No. 259-272." Yet Case No. 222 of 2012 aforesaid makes reference to plot numbers 259-269.

11. Our reading of a letter dated 10th August 2011 from the Chief Land Registrar addressed to the District Land Registrar (Murang'a) confirms, as the learned judge found, that, plot No. 39A was non-existent. The letter reads in part:

> "... there is a court order nullifying plots 39A and 259-272, which should be implemented."
>
> The Director of Adjudication and Settlement wrote to the Director of Survey ... to cancel the mutation and subsequently amend ... to reflect the right size for plot 50 as 44 Acres. [some words have been left out from the record]
>
> Kindly liaise with the District Surveyor and take necessary measures to ensure compliance with the court order Nyeri/HCCC 252/1983 dated 11th May 2010."

12. The foregoing background serves to inform this Court's decision on whether the appellants' suit in Nyeri E.L.C No. 423 of 2014 from which this appeal arose was res judicata.

The Parties

13. The Appellants were the plaintiffs in Nyeri E.L.C No. 423 of 2014 (formerly Nyeri High Court Civil Suit No. 222 of 2012) in which they had sued the respondent seeking "... to safeguard their proprietary interests in the suit property [being] Plots No. Loc. 7/Maragua Ridge/264-269". The impugned Ruling arose from the respondent's above-mentioned application in the ELC case.

14. As we have already stated, Kamau Ngure (Deceased) was the respondent's father and original owner of the suit property comprised of LR No. Loc. 7/Maragua Ridge/50 measuring 44 Acres in the approximate. Following his father's demise, the respondent took out Letters of Administration ad litem in the High Court of Kenya at Murang'a Probate and Administration Cause No. 1030 of 2013 limited to the purposes of filing and defending suits on behalf of his deceased father's estate. The grant was issued on 25th October 2013.

Dispute and Findings of the ELC

15. After the respective parties herein canvassed the respondents Notice of Motion dated 13th July, 2015, the Judge analyzed the record in light of the rival positions before her and made observations thereon inter alia that the record before the Judge revealed that, on 11th July, 2014, the same court had dismissed an application for stay of execution of the Order dated 18th February, 2013 in terms of which eviction

orders had been issued against the 5th, 8th and 9th appellants. It is the above order that prompted the respondent to file the application then under consideration before the Judge. The Judge appreciated that although not all the plaintiffs were parties to Nyeri HCCC No. 282 of 1983 (read 252 of 1983) and HCC No. 222 of 2012, in which the eviction orders had been issued in favour of the respondent, the issues raised in the two suits were the same to wit whether LR No. Loc. 7/Ridge Block 39A from which the suit properties in the suit before the Judge namely, Plot Nos. 264 – 269 exist; that whereas the alleged Plot No. LR No. Loc 7/Ridge Block 39A was found to be nonexistent vide the proceedings conducted in 252 of 1983, the appellants had placed reliance on a letter from the Ministry of Lands and Settlement Department of Lands Adjudication and settlement dated 23rd September, 2005, addressed to the appellants indicated as allotees of Plots Nos. 259 to 265 Maragua Ridge Settlement Scheme formerly Plot No. 39 A indicated to have been excised from Plot No. 50 for purposes of settling the named allottees whose plots were water logged.

16. It was the Judge's further observation that Plot No. 50 referred to above from which the claimed plots were allegedly curved was the same one that had been successfully claimed by the respondent's father in Nyeri HCCC No. 282 of 1983 (read 252 of 1983) at the conclusion of which the respondent's father was declared to be the exclusive owner and eviction orders issued to that effect against the defendants in the said suit. The learned Judge went further to observe that according to the records before the Court, section 39'A' on which the appellants had hinged their claim was nullified vide the contents of a letter from the Ministry of Lands Department of Lands dated 10th August, 2011 then annexed to the respondent's affidavit.

17. In light of the foregoing observations, the learned Judge was of the considered view that, according to her, the question of ownership of the parcel of land claimed by the respondent and of the existence of Plot No. 39A in which the appellants claim was hinged had already been heard and determined by a court of competent jurisdiction and, on that account, sustained the respondent's plea of res judicata, triggering the appeal under consideration.

18. Aggrieved by the decision of L. N. Waithaka, J. the Appellants instituted this appeal against the impugned Ruling raising five (5) grounds, which we find prudent to summarize and reframe as follows. According to the appellants, the learned Judge –

    a. erred in holding that E.L.C Case No. 423 of 2014 was res judicata;

    b. failed to appreciate that E.L.C Case No. 423 of 2014 involved parcels of land different from the ones in dispute in Nyeri HCCC No. 252 of 1983;

    c. failed to appreciate that land parcels No. Maragua Ridge/259-269 existed separately and independently of land parcel No. Loc. 7/Maragua Ridge/50; and

    d. erred in applying the doctrine of res judicata in two separate and distinct suits.

19. On the foregoing grounds, the Appellants have asked us to –

    a. set aside the Ruling and orders made in Nyeri E.L.C Case No. 423 of 2014 given on 26th May 2016;

    b. order and direct that Nyeri E.L.C Case No. 423 of 2014 be reinstated and heard on its merits; and

    c. order that costs of this appeal be borne by the respondent.

Plenary Session of the Appeal

20. The appeal came before us for plenary hearing on 3rd November, 2011 canvassed via Go-To-Meeting platform. When called out, learned counsel, Mr. Ben Musyoki was in attendance for the appellant. The court being satisfied that learned counsel, Kibira Wachira instructed by the firm of Kabira Wachira & Co. Advocates on record for the respondent had due notice of the hearing date, having been served electronically with a hearing notice by the Deputy Registrar of this Court on 26th October, 2021 at 3.25pm, allowed Mr. Musyoki to prosecute the appeal in response to which the respondent had filed written submissions in opposition thereto and, in the absence of explanation for nonattendance, allowed Mr. Musyoki to prosecute the appeal. Learned counsel adopted his written submissions without highlighting them orally.

Respective Parties Submission

21. Supporting the appeal, it is the appellants' submissions that the appeal emanates from the ruling and orders of the Superior Court in which it struck out the appellants' suit on account of it being res judicata, Nyeri HCC No. 252 of 1983 (hereinafter referred to as the former suit). They raised five grounds of appeal against the impugned decision of the learned Judge in Nyeri ELC No. 423 of 2014. However, since all the grounds relate to the same subject as to whether the appellants suit before the trial court was res judicata, the appellant found it prudent to address all the five (5) grounds of appeal cumulatively.

22. It is the appellants position that the law on res judicata is now settled. The threshold for sustaining a plea for res judicata are:

    a. the suit or issue must have been directly and substantively in issue in the former suit;

    b. the former suit must have been between the same parties or parties under whom they or any of them claim and litigate under the same title; and

    c. the issues must have been heard and finally determined in the former suit by a competent court; all of which the law requires that these be satisfied conjunctively, meaning that, if any fails, the plea of res judicata must fail.

23. With regard to the first ingredient, it is the appellants' contention that this was not established in view of the fact that only the 5th and 9th appellants were party to the former sued in their individual capacity, and not in a representative capacity. The learned Judge appreciated as much in the impugned Ruling, and should not have sustained the respondent's plea of res judicata with regard to the rest of the appellants notwithstanding the position in law that mere inclusion of fresh parties to a suit is not per se sufficient to assist a party escape the dragnet of the application of the doctrine of res judicata; and that the substratum of the former suit (252 of 1983) was Loc 7/Maragwa Ridge/50.

24. It is also the appellants position that element/ingredient (b) under the said doctrine was also not satisfied because (i) the decree in the former suit only related to plot no. Loc 7/Maragwa Ridge/50 and did not mention Plot No. 39A; (ii) the averments in the former suit that Plot No. 39/A was adjacent to Plot No. 50 was not rebutted, the Judge erroneously relied on a letter from the Ministry dated 10th August, 2011 stating that the procedures resulting in the creation of Plot No. 39A were nullified which, in the appellants opinion, contradicted an earlier letter from the same Ministry dated 23rd August, 2005 clearly indicating that Plot 39A existed on the ground. The Judge should not have relied on the said unauthenticated communication to vary a decree of the court in the former suit when it was evident from the record that the two communications came long after the decree in the former

suit had been issued. Neither were the makers of those communication called to tender evidence to verify their authenticity.

25. The learned Judge is also faulted for failure to properly appreciate the appellants position that parcel number 259 to 269 as shown in the letter of 23rd August, 2005 existed long after the judgment in the former suit, thus demonstrating that they were duly registered with the lands and settlement fund trustees, and that the said plots would be transferred to the allottees upon completion of payment of dues to the Settlement Fund Trustees. The Judge also failed to appreciate that the respondent never made any application to have the said suit plots transferred to him or alternatively declared a nullity; that it is only the 5th and 9th appellants who were evicted from Plot No. 50 in 1999, and their efforts to go back to the said plot were fruitless; that what was in dispute in the former suit was a boundary dispute between the respondent and the 5th and 9th appellants, as more particularly set out in the decree.

26. On the last element/ingredient as to whether the matter was finally determined, by a court of competent jurisdiction, the appellants do not dispute that the former suit was determined by a competent court, but dispute that the existence of parcel number 39A and its ownership was an issue in the former suit in view of the fact that, even though the pleading in the said suit referred to Loc. 7/Maragwa Ridge/50, the decree made reference to Loc. 17/Maragwa Ridge/500, the letters the Judge referred to and relied upon as basis for finding in favour of the respondent also gave different description of the parcels of land in issue. There is no mention of existence or otherwise of Plot No. 39A.

27. In support of his submissions, the appellants rely on the case of *Michael Bett Siror v Jackson Koech [2019] eKLR* for the holding inter alia that where theissue of res judicata is so contentious and unclear, the matter calls for further interrogation; *Housing Finance Company of Kenya v Captain J. N. Wafubwa [2014] eKLR* for the proposition that a suit initiated after circumstance relatingto the earlier suit and which had not been crystallized in the earlier suit, changed, the new suit is not res judicata; and lastly, the case of *Accredo AG & 3 Others v Stefano Uccelli & Another [2018] eKLR* in which the court approved the Supreme Court holding in the case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR* for the reiteration that in order for the plea of res judicata to be sustained, all the above elements must be established. Accordingly, they contended that the Judge erred in sustaining the respondents plea of res judicata in the absence of establishment of the above elements as was required in law.

28. In rebuttal, the respondent set out the history of the litigation resulting in this appeal as outlined above.

29. Turning to the law, it is the respondent's position that the Judge rightly sustained his plea of res judicata against the 5th and 9th appellants who, together with the 1st appellant's husband, were involved in the litigation that pitched him and them in Nyeri Civil Suit Number 252 of 1983 in relation to which the three were successfully evicted from the suit property. They never appealed against those eviction orders. They instead resorted to filing numerous suits in various courts, all of which ended in the respondent's favour. As for the other seven appellants, it is the respondent's position that they had an interest in the portion of land the other three were litigating over. They chose not to participate. They are therefore bound by the results of the litigation in which the other three were involved, especially when it is explicit from the record that the litigation was in respect of the same parcel of land, and it mattered not whether the subject matter of the litigation is described as Maragwa Ridge/50, Plot 39A or the subsequent subdivision of Plot Numbers 259, 260, 261, 262, 263, 264, 265, 266, 268 and 269 as these refer to one and the same portion part of parcel number Loc. 7/Maragwa Ridge/50. The court is therefore urged not to sustain the claim of the other seven appellants as in doing so would

be tantamount to allowing the 1st, 5th and 9th respondents to relitigate the numerous unsuccessful litigation they mounted against the respondent through the three appellants.

30. To buttress the above submissions, the respondent among others relies on the case of William Koross (*Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR* for the holding/proposition inter alia that the principle is founded in equity, justice and good conscience, which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. He also relied on the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR for the holding/proposition that parties who having an interest in a matter being litigated, but choose to be by standers, should be held bound by the outcome of the litigation, and not to be allowed to relitigate over the same.

31. This is an interlocutory appeal touching on the exercise of the trial Judge's exercise of discretion in disallowing the appellants' application. An appeal of this nature has been considered by the Court in numerous decisions, both by the predecessor of the Court and this Court itself. A case in point is *Kenindia Assurance Company Limited v Mohamed Hassan Kini [2020] eKLR*.

32. We have examined the record of appeal in light of our above mandate, rival submission and principles of case law of the respective parties herein in support of their opposing positions. The issues that fall for our interrogation may be summarized and reframed as follows:

    a. whether Nyeri E.L.C Cause No. 423 of 2014 was res judicata in relation to all or any of the appellants;

    b. what orders and directions ought to be made in this appeal; and

    c. who bears the costs of this appeal.

33. With regard to the first issue, the decisive question in this appeal is whether ELC Case No. 423 of 2014 was res judicata and, if so, in relation to who among the parties herein. Both the predecessor of the Court and this Court have on numerous occasions pronounced themselves on the doctrine of res judicata. On the authority of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [2016] eKLR*, the doctrine is founded on public policy andis aimed at achieving two objectives –

    a. that there must be finality to litigation; and

    b. that an individual should not be harassed twice with the same account of litigation.

34. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*, thisCourt observed:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability, which is one of the essential

ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

35. To this end, section 7 of the *Civil Procedure Act* provides:

> "No court shall try any suit 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 in which such issue has been subsequently raised, and has been heard and finally decided by such court."

36. The question we are confronted with herein is whether the conflicting claims of ownership by the respective parties herein in the different proceedings mentioned above in respect of the suit property have been directly and substantially in issue between the same parties. If the answer is in the affirmative, we are mandated to ascertain whether those conflicting claims have been determined with finality by a court of competent jurisdiction. The record is explicit as already highlighted above that issues raised in the litigation giving rise to this appeal that is ELC No. 423 of 2014, are the conflicting claims of ownership of the suit property, and the related applications intended to resist eviction, have been heard and finally decided by courts of competent jurisdiction in –

a. Nyeri HCCC No. 252 of 1983;

b. Murang'a SPMCC No. 1 of 2000; and

c. Thika CMCC No. 476 of 2000.

37. In view of the foregoing, we find no reason to fault the learned Judge's finding that Nyeri ELC Case No. 423 of 2014 is res judicata, but only with respect to the 5th and 9th appellants. The same applies to the 8th appellant (Eunice Nyokabi Muiruri), whose husband, Muiruri Njoroge, was (a) the 2nd defendant in Nyeri HCCC No. 252 of 1983; and (b) the 2nd applicant in an application in Nyeri Court of Appeal Civil Application No. 230 of 2011 seeking stay of execution of the Ruling given in the 1983 case. However, he was not party to the proceedings in Nyeri ELC No. 423 of 2014 in which the impugned Ruling was given.

38. To our mind, the test for determining the application of the doctrine of res-judicata in the cases to which the 5th and 9th appellants, and the husband to the 8th appellant, were party has been satisfied as required by section 7 of the *Civil Procedure Act*. The Supreme Court in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR held that all the elementsoutlined under that section must be satisfied conjunctively for the doctrine to be invoked. We are satisfied that –

a. the suit to which this appeal relates, or the issue of conflicting claims of ownership of the suit property, was directly and substantially in issue in the former suits and applications as between the 5th, 8th and 9th appellants;

b. those former suits were 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 suits as stated above; and

e. the courts that formerly heard and determined the issue were competent to try the subsequent suit from which this appeal arose.

39. In our considered view, we find that the claims by the 1st, 2nd, 3rd, 4th, 6th, 7th, and 10th appellants in Nyeri ELC Case No. 423 of 2014 had not been previously heard and determined. We appreciate the appellants' contention that these should be deemed bystanders and therefore deemed to have relitigated their interests through the other persons by reason of their claim having arisen from the same set of circumstances as those of the other three. In our considered view, this was never pleaded before the trial Judge to express herself thereon. It is therefore just and fair that the trial court do express itself substantively on the claim of these appellants. Accordingly, their suit in this case was not res judicata as declared by the learned Judge. As to whether plot No. 39A out of which the various parcels claimed by the appellants were curved has any relation to the suit property (LR No. Loc. 7/Maragua Ridge/50) remains to be determined with finality by the trial court in Nyeri ELC No. 423 of 2014. The same applies to the conflicting claims of ownership by those appellants, which call for determination on their merits. Accordingly, we find no reason to shut out the 1st, 2nd, 3rd, 4th, 6th, 7th and 10th appellants from being heard. To do so would be an infringement of their right to fair hearing guaranteed under Article 50 of the Constitution.

40. See *Mpungu & Sons Transporters Ltd vs. Attorney General & Another [2006] 1EA 212*; *Richard Nchapi Leiyagu vs. IEBC & 2 others*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and, in the Tanzanian case of *Abbas Sherally and Another vs. Abdul Fazaiboy,* Civil Application No. 33 of 2003;for the holding inter alia that:

i. the right to a hearing is not only constitutionally entrenched but also the cornerstone of the Rule of law;

ii. the right to be heard is a valued right; and

iii. the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;

What then are the Remedies Available to the Appellants?

41. Having found that the suit by the 1st, 2nd, 3rd, 4th, 6th, 7th and 10th appellants in Nyeri ELC No. 423 of 2014 was not res judicata –

a. We uphold the Ruling and Order of the ELC in Nyeri ELC Case No. 423 of 2014 (L. N. Waithaka, J) delivered on 26th May 2016 as against the 5th, 8th and 9th appellants;

b. We hereby set aside the Ruling and Order of the ELC in Nyeri ELC Case No. 423 of 2014 (L. N. Waithaka, J) delivered on 26th May 2016 as respects the 1st, 2nd, 3rd, 4th, 6th, 7th and 10th appellants; and

c. Accordingly, we order and direct that the 1st, 2nd, 3rd, 4th, 6th, 7th and 10th appellants' suit in Nyeri ELC Case No. 423 of 2014 be heard and determined on its merits priority basis considering its age and by a Judge other than L. N. Waithaka, J.

d. The parties bear their own costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR