



**Mutio v Kaesa (Suing on Behalf of the Estate of Kaesa Kiiti - Deceased)
& 4 others; Mutemi (Exparte Applicant) (Environment and Land
Appeal 5 of 2022) [2023] KEELC 17541 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 5 OF 2022**

**LG KIMANI, J
MAY 18, 2023**

BETWEEN

CHRISTOPHER MUTEMI MUTIO APPELLANT

AND

**ESTHER MASAA KAESA (SUING ON BEHALF OF THE ESTATE OF KAESA
KIITI - DECEASED) 1ST RESPONDENT
PETER KIITI NGUI 2ND RESPONDENT
SIMEON MUNYASYA 3RD RESPONDENT
SAMUEL M. MWINZI 4TH RESPONDENT
KITUI COUNTY COUNCIL 5TH RESPONDENT**

AND

ANGELINA MANZILE MUTEMI EXPARTE APPLICANT

RULING

1. This ruling is in respect of an application by Angeline Manzile Mutemi under a Notice of Motion dated November 24, 2022 seeking the following orders:
 1. Spent.
 2. That this Honourable court to reinstate the instant appeal for full hearing and determination.
 3. That this Honourable Court do grant leave to the Applicant to file an application for substitution out of time and beyond the statutory period.



4. That Angeline Manzile Mutemi be substituted as the Appellant in these proceedings in place of Christopher Mutemi Mutio (Deceased) who passed on September 27, 2019.
2. The applicant states that she is the Administrator of the estate of the Appellant who is now deceased and that the appeal abated by operation of the law on September 27, 2020. She stated that she only became aware of the appeal when going through her deceased husband's documents and efforts to get any information from the previous advocates were unsuccessful. She eventually secured a Grant of Letters of administration Ad Litem to the estate of the deceased on September 27, 2021.
3. The Applicant avers that there were difficulties experienced between her lawyers and the deceased's lawyers especially after Mr Nzili Advocate became a Judge, and for that reason she was unable to file this application immediately. She further stated that it took her time to collect the deceased estate where she came across documents relating to this appeal and she was unable to immediately get updated on this appeal due to the above mentioned difficulties with the deceased lawyers.
4. The Applicant also stated that she did not file the succession proceedings on time due to the covid-19 regulations which suspended court activities and occasioned delay in obtaining a death certificate.
5. The appeal herein is against the Judgment delivered on May 18, 2011 in Mwingi SRMCC No 111 of 1988 filed through Memorandum of Appeal dated June 14, 2011.
6. The 1st Respondent filed a Notice of Preliminary Objection dated February 14, 2023 on the following grounds:
 1. That the Applicant's Application is Res Judicata in that she had filed earlier an application dated December 6, 2021 seeking for similar orders as in the present application.
 2. That the Applicant's said application was dismissed by this Honourable Court vide a ruling delivered on October 27, 2022 and therefore her present application offends the doctrine of Res Judicata enacted under Section 7 of the Civil Procedure Act and that the same should therefore be struck out with costs.

The 1st Respondent's Submissions on the Preliminary Objection

7. Counsel for the 1st Respondent relied on Section 7 of the Civil Procedure Act (2010) on res judicata, submitting that the present application dated November 24, 2022 is an exact duplicate of the Applicant's earlier application dated December 6, 2021, with the only difference being that she has added 2 prayers, one for having the matter certified as urgent and the other for reinstatement of the appeal.
8. It is the 1st Respondent's submission that the other 2 issues ought to have been raised in the earlier application and that the matter falls squarely within explanation 4 of Section 7 of the Civil Procedure Act.
9. The 1st Respondent relied on the case of Accredo Ag & others v Steffano Uccelli & Another (2019) eKLR where the court of appeal reiterated the court's decision in John Florence Maritime services Limited & another v Transport ad Infrastructure & 3 others [2015] eKLR where the court also stated that the rationale behind res-judicata is based on the public interest that there should be an end to litigation.
10. Since the Court pronounced its ruling on October 27, 2022, it is the 1st respondent's submission that the Court lacks the requisite jurisdiction to entertain the second application as the same is res-judicata. Counsel further submitted that the doctrine of res judicata also covers issues and facts which are closely



related to the subject matter that could be raised if new proceedings are to be instituted as they relied on the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited*[2017] eKLR.

Applicant's submissions on the Preliminary Objection

11. Counsel for the Applicant submits that the prayers sought in the present application are different from the prayers sought in the previous application dated December 6, 2021 and therefore the present application is not *res judicata*. In particular the Applicant states that the issue of reinstating the appeal for full hearing and determination has not been dealt with by the Court. They relied on the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017)eKLR where the court held that the purpose of *res judicata* is to bring an end to litigation. They also relied as well on the case of *Musankishay Kalala Paulin v Director Criminal Investigations & 4 others* (2022)eKLR.
12. It is therefore the Applicant's submission that the Applicant and the beneficiaries of the Estate of the deceased should not be locked out of litigation on technicalities and parties to be allowed to litigate all the issues at hand in the appeal.

Analysis and Determination

13. The Court has considered the preliminary objection and the submissions filed. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
14. The above legal position has been cemented in the now famous case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*. [1969] EA 696 where the Court held that: -

“A preliminary Objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop”
15. The law requires that a Preliminary Objection be brought only on a point of law as has been held in many legal precedent that if the point of law is determined in the favour of the Respondents it would conclude the litigation. In determining the Preliminary Objection the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records.
16. Section 7 of the *Civil Procedure Act* 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.”
17. In the present case the two applications referred to in the Preliminary Objection and the ruling of October 27, 2022 are in the Courts record. The prayers in the current application dated November 24, 2022 have been set out in full at the commencement of this ruling while in the first application dated December 6, 2021, the Applicant sought the following orders:



1. That this Honourable court do grant leave to the Applicant to file an application for substitution out of time and beyond the statutory period.
 2. That Angelina Manzile Mutemi be substituted as the Appellant in these proceedings in place of Christopher Mutemi Mutio (Deceased) who passed on, on September 27, 2019.
18. The Court delivered its ruling on that application on the October 27, 2022 and dismissed the same for the reason that the suit had already abated on April 27, 2020 and the Applicant had not prayed for an order to revive the suit. Further, this Court was of the view that:

“.....even if the relevant application for revival of the abated appeal had been made, I am not convinced that sufficient reasons have been given for failure to make the application before abatement of the appeal and in any case within a reasonable time after the said abatement.”

19. The Applicant relied on the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, where the Supreme Court while considering the legal provision on res judicata held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

“(a) The suit or issue was 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.”

20. The court is of the view that the issues raised in the present application are substantially the same as those raised in the previous application dated December 6, 2021 save for the added prayer that the appeal be reinstated. The substance of the first application was that the Appellant was deceased and the time allowed for substitution by the administrator to his estate under Order 24 of the *Civil Procedure Rules* had lapsed and that by operation of the law the appeal had abated since no application had been made for substitution. It is also clear that the parties to the two applications are the same and are litigating under the same title. The Court delivered its ruling on the application being a competent court with the requisite jurisdiction.

21. In the Courts view the previous application was considered on merit and in great detail and the principles applicable to the grant of the orders sought were also considered. One of the grounds for dismissal of the application was that the Applicant did not seek an order for revival of the abated appeal under Order 24 Rule 7 of the *Civil Procedure Rules*. The Court relied on the Court of Appeal decision in the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR where the Court had this to say about abatement of a suit by death of the plaintiff.

“The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”



22. The final order of this court on the previous application dated December 6, 2021 was;

“I therefore find that there is no subsisting appeal that is capable of forming the basis for the orders prayed for in the application dated December 6, 2021. I find that the prayers sought in the said application are unsustainable and the application is thus incompetent and the same is hereby dismissed with costs to the 1st Respondent.”

23. What the Applicant seeks to do in the present application is to try and cure the fault found by the Court in the initial application by adding the prayer for reinstatement of the Appeal for hearing and determination. In my view the Applicant had the opportunity to make the additional prayer for revival and/or reinstatement of the appeal at the time of making the initial application which she failed to do.

24. The explanation of what res judicata constitutes is given under section 7 of the Civil Procedure Act. Explanation. —(4) provides;

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

25. It is also noted that prayer number 2 and 3 of the present application are in the exact same terms as prayer number 1 and 2 of the previous application. Even if the prayer 1 of the present application were to survive Res judicata the other two prayers have been heard and fully determined and cannot be heard again. This Court cannot revive or reinstate a suit that has already abated in absence of an administrator of the estate of the deceased. In the Courts view the additional prayer has been brought by the Applicant in order to try and evade the doctrine of res judicata while fully knowing that the substance of the application has already been heard and determined.

26. In the case of E.T v Attorney General & another [2012] eKLR the Court warned against such conduct and urged vigilance in such cases as it held that;

“The courts 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & 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, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC 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 in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”

27. In finding that the principle of *res judicata* applies to similar applications, the Court in Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR in an earlier application ruled that the application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal.” it could not be resuscitated by another Application.



28. The Court of Appeal in that case held that:

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or Civil Procedure Act caters for.”

29. For the foregoing reasons, this court finds that the Preliminary objection dated February 14, 2023 has merit and the same is upheld. The application dated November 24, 2022 is hereby struck out for being res judicata having been heard and determined by way of the ruling of the Court dated October 27, 2022. Costs of the application are awarded to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 18TH DAY OF MAY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

M/s Mbilo holding brief for Mulu for Ex Parte Applicant

Kimondo Mubea for the 1st Respondent

