



**Muthengi v Njagi (Environment and Land Appeal 10 of 2017)  
[2023] KEELC 19029 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19029 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL 10 OF 2017  
CK YANO, J  
JULY 26, 2023  
(FORMERLY MERU ELC. CASE NO. 06 OF 2014)**

**BETWEEN**

**VIRGINIA MUCHANDI MUTHENGI ..... APPELLANT**

**AND**

**ELISHA K NJAGI ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion dated July 3, 2023 by the Applicant/Judgment debtor seeking to withdraw the services of M/s. Kurauka & Co. Advocates and for the Applicant to be granted leave to engage another firm of advocates; that the Applicant be released from Meru Women G. K Prison on a reasonable bond pending hearing of the application interpartes; that the committal warrants dated June 26, 2023 committing the Applicant/Judgment Debtor to Civil jail be withdrawn and further execution against the Applicant be suspended pending the hearing and final determination of the application and/or until further orders from this court; that all executions against the Applicant herein be varied and/or set aside; and that the prosecution of the Judgment creditor's Bill of costs instant suit be heard de novo and that the costs of the application be provided for.
2. The application is brought under order 51 rule 1, order 9 rule 9, 10 and 11 of the *Civil Procedure Rules*, sections 3A, 43(3)(b), and 63(e) of the *Civil Procedure Act*, Articles 47(1), 48, 50(1), 51(1) & (2) and 159(2)(a), (b), (d) and (e) of the *Constitution of Kenya, 2010* and all other enabling provisions of the law.
3. The application is supported by the affidavit of Virginia Muchandi Muthengi the Applicant/Judgment Debtor sworn on 3<sup>rd</sup> July, 2023 and is based on the following grounds;



- a. That after the Applicant/Judgment Debtor was served with the Notice to show Cause in the instant suit, the Applicant/ Judgment Debtor instructed M/s. Kurauka& Co. Advocates to act for her.
  - b. That M/s Kurauka& Co. Advocates did not respond appropriately to the Notice to show cause dated 14.07.2022 as per the Applicant's/Judgment Debtor's instructions.
  - c. That the Notice to show cause dated 14.05.2022 was prosecuted ex-parte and in the absence of M/S.Kurauka& Co. Advocates and warrants of arrest issued against the Applicant/Judgment Debtor.
  - d. That warrants to commit the Applicant/Judgment Debtor to Civil jail were issued on 26.06.2023.
  - e. That the Applicant /Judgment Debtor further instructed M/S. KURAUKA & Co. Advocates to file an application for her release from jail.
  - f. That M/s. Kurauka & Co. Advocates filed an application dated 26.06.2023 for the Applicant/ Judgment Debtor release from Meru Women G.K. Prison and which application was dismissed on 30.06.2023 and the court held that the application was not merited as no medical report was exhibited on the application to warrant the Applicant/Judgment Debtor to be released from jail under section 43(3)(b) of the Civil Procedure Act.
  - g. That the foregoing clearly demonstrated that M/s. Kurauka& Co. Advocates did not act as per the Applicant's/Judgment Debtor's instructions and the Applicant/Judgment Debtor ought not to be condemned on the mistakes of a duly instructed counsel.
4. In her affidavit in support of the application, the Applicant has reiterated the above grounds and annexed a copy of the said warrant of committal to civil jail, copy of the affidavit in support of the application dated 26.06.2023 and a copy of a Medical Report. The Applicant has further deponed that she is sickly and requires dire medical attention, adding that the Respondent/Judgment Creditor will not be occasioned any prejudice if the application is allowed.
  5. In opposing the application, the Respondent filed an Affidavit sworn on 19<sup>th</sup> July, 2023 in which he states inter alia, that the application herein is res judicata, that the court is functus officio and cannot deal with the matter as it will be sitting on appeal of its own decision, that the treatment notes is dated 28.6.2023, some 2 days after the applicant was committed to prison and have been conveniently cooked/prepared to hoodwink the court and that whereas the said treatment notes is typed "patient follow up", there are no previous treatment notes attached to show that the Applicant was ill before 26.6.2023. The Respondent further states that the Applicant has no respect for court orders because she has not made any attempts to pay costs 3 years after the same were assessed and that she has continued to disobey the lower court order of injunction by entering into the suit land and cultivating it and has caused extensive damage to the property on the land and further that the Applicant is facing criminal charges of malicious damage at Marimanti Law Court. The Respondent urged the court to dismiss the application with costs.
  6. When the matter came up for hearing on 24<sup>th</sup> July, 2023, the same was heard virtually via Microsoft Teams. The Applicant appeared in person while Ms. Mwit advocate held brief for Mr. Murango Mwenda Advocate for the Respondent. They basically reiterated the contents of their respective affidavits.
  7. I have considered the application, the response and the rival submissions made. Both parties are in agreement that there was a similar application dated 26.6.2023 filed by the Applicant through her



previous advocates on record and which application was dismissed with costs on 30<sup>th</sup> June, 2023. The Applicant appears to blame her then advocates M/s. Kurauka & Co. Advocates for the dismissal. The issues I find for determination are whether the application is res judicata and whether the court should grant the orders sought in the application.

8. Order 9 Rule 9 of the Civil Procedure provides that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court either upon an application with notice to all the parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be. Rule 10 provides that an application under Rule 9 may be considered with other prayers, provided the question of change of advocate or party intending to act in person shall be determined first.
9. It is not in dispute that the firm of M/s. Kurauka & Co. Advocates were previously on record for the Applicant. It is also not in dispute that judgment has been passed in the matter and the Applicant now seeks leave to act in person or appoint another advocate. I have perused the court record. I note that there is a letter dated July 18, 2023 and filed in court on July 19, 2023 in which the firm of M/s. Kurauka & Co. Advocates have indicated that they have no objection to the application by the Applicant to act in person. I therefore see no reason why leave to act in person should not be granted and therefore the application is allowed in terms of prayer 2 thereof.
10. I now turn to the issue as to whether the application is res judicata or not. In her application dated June 26, 2023, the Applicant herein sought for her immediate release from Civil jail because she was unwell and for stay of the warrants of arrest issued on 18<sup>th</sup> May, 2023 as well as rectification of the amount of costs awarded herein. In this case, the suit was dismissed for lack of prosecution on March 16, 2017 in terms of Order 17 of the Civil Procedure Rules. The Applicant's application to reinstate the appeal was dismissed by the court on 24<sup>th</sup> February, 2021. Another application for stay of execution of costs was also dismissed on 16<sup>th</sup> June, 2021 when the court found that it was functus officio. All those rulings were never appealed against, and the matter went before the Deputy Registrar of this court for taxation of the Respondent's Bill of costs.
11. In a ruling dated October 14, 2021, the Deputy Registrar taxed the Respondent's Bill of costs at Kshs.130,570/=. Thereafter, the Applicant herein was served with a notice to show cause but failed to attend court and a warrant of arrest was issued against her and she was later arrested and committed to civil jail. By the application dated June 26, 2023, the Applicant sought to set aside the orders committing her to civil jail and for rectification of the amount of costs. As already stated, the said application was dismissed by the Deputy Registrar on 30<sup>th</sup> June, 2023. The Applicant has not appealed against the said ruling neither has she applied for a review. Instead, the Applicant filed the instant application. It is clear that besides the issue of representation, the current application is seeking similar orders as those sought in the application dated 26.6.2023 and which was decided by the ruling dated June 30, 2023.
12. The law pertaining to the doctrine of res judicata is in section 7 of the Civil Procedure Act which provides as follows:
  - “7. 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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

13. There is no doubt that the principle applies to applications with the same force whether the application be final or interlocutory. There is no dispute that the parties are the same in all these proceedings. In both the earlier application dated 26.6.2023 and the present one, the Applicant mainly sought similar orders. The issues are similar in all forms and they have already been determined by the court in the earlier decision. I have not heard the Applicant allege that the Deputy Registrar who made the earlier decision had no jurisdiction. Even if he had no jurisdiction, the Applicant could only have approached this court by way of appeal, and not filing a similar application as the earlier one. The statutory provision under section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or application or issue if the same was substantially in issue in a former suit or application between the same parties, if the issue was determined in the former application after a hearing. By virtue of section 7 of the Civil Procedure Act, it is clear to me that the orders sought in this application are barred by the doctrine of res judicata and I am in agreement with the Respondent’s submission to that effect.
14. By reason of the foregoing, I find that save for prayer 2 of the application, the application is an abuse of the court process as it raises issues which have been substantially litigated and adjudicated upon or which ought to have been raised in the earlier application.
15. In the result, I make the following orders:
  - a. Prayer 2 of the application dated July 3, 2023 is allowed.
  - b. Prayer 3, 4, 5, 6 & 7 are disallowed.
  - c. Costs of the application are awarded to the Respondent.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**In The Presence Of:**

CA: Martha

Applicant present virtually vide Microsoft Teams

N/A for Respondent

**C. K. YANO,**

**JUDGE.**

