



**Attorney General, Mombasa v Shah & 2 others; Chairperson, Mvita Constituency
Development Fund Committee & 3 others (Objector) (Environment & Land
Case 50 of 2016) [2023] KEELC 20104 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 50 OF 2016
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

HON ATTORNEY GENERAL, MOMBASA APPLICANT

AND

RATILAL CHELA SHAH 1ST RESPONDENT

DI NUMATI RATILAL CHELA SHAH 2ND RESPONDENT

BHIKHU RATILAL GHEI-A SHAH 3RD RESPONDENT

AND

**CHAIRPERSON, MVITA CONSTITUENCY DEVELOPMENT FUND
COMMITTEE OBJECTOR**

MP HON ABDULSWAMAD SHARIFF NASSIR OBJECTOR

CONSTITUENCY DEVELOPMENT FUND BOARD OBJECTOR

MVITA, CONSTITUENCY DEVELOPMENT FUND OBJECTOR

RULING

1. The application is dated April 20, 2023 and is brought under Sections IA, 1B, 34, 34, 38 and 63 (e) of the Civil Procedures Act, Section 21 (4), (5) of the *Government proceedings Act*, Order 22 Rules 51 & 52, Order 51 *Civil Procedure Rules 2010*, Sections IA. 1B & of the *Civil Procedure Act* seeking the following orders;
 1. That the Honorable Court be pleased to certify this matter urgent and service thereof be dispensed with in the first instance.



2. That the Hon. Attorney General, be granted leave to come on record and represent the Objectors in this matter.
 3. That there be a stay of execution of the warrants of attachment and warrant of the attached goods by Autoland Auctioneers, the property of the 4th Objector pending inter parties hearing of this application.
 4. That the Decree holders acting through their agent Autoland Auctioneers or any other auctioneers and or agents be permanently restrained from attaching the goods of the Objectors.
 5. That the Proclamation dated April 12, 2023 by Autoland Auctioneers in execution of this honorable court's decree be raised with immediate effect.
 6. That the costs of this application be met by the Decree holder.
2. It is based on the grounds that the 4th Objector is the owner of the goods attached and was not party to the proceedings thus should not be condemned unheard. That the objectors are Government entities and protected from execution under Section 21 (4), (5) of the [Government Proceedings Act](#).
 3. The Respondent stated that the application is defective, unsustainable and meritless. The heading of the application is not in line with the heading of the suit and is thus a strange application brought into this suit and ought to be struck out and expunged from the record. It is portrayed as though there are 3 or 4 objectors yet in the entirety of the application, there is neither information about the other objectors nor any deposition or filing by themselves about any objection. That the Applicant wants to create a mountain out of a mound by trying to alarm the court that there are many objections to the execution process herein. The application is res judicata and an abuse of court process. The Applicant/4th Objector herein had on August 9, 2021 made a similar application in which it prayed for setting aside of the judgment and decree issued on May 27, 2021. Leave to the 2nd Defendant to enter appearance and file defence out of time. The self-same orders are being sought in the instant application though now disguised as being brought by an "objector" which is just the 1st Defendant herein.
 4. This court has considered the application and submissions therein. The Respondents has stated that this application is res judicata. Section 7 of the [Civil Procedure Act](#) on Res judicata, reads as follows:

“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.”
 5. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
 6. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that



respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that;

“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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

7. Expounding further on the essence of the doctrine this Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows;

“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.”

8. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (supra), the Supreme Court while considering the said provision 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.”

9. I have perused the court record and find that the Applicants now Objectors herein had on August 9, 2021 made an application in which they prayed for setting aside of the judgment and decree issued on May 27, 2021 and leave for the 1st and 2nd Defendant to enter appearance and file defence out of time. In my ruling dated December 7, 2021, the court dismissed the said application with costs to the Plaintiffs. In the ruling, the court determined the issue of service by finding that the Applicant was served. It also found that the attached draft defence did not raise any triable issue. No appeal or review has ever been filed against the decision. The Applicants have now turned into objectors seeking the



same prayers. I find this is an abuse of the court process and res judicata. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

