



**Adhiambo v Ochiel (Environment and Land Miscellaneous Application
E001 of 2025) [2025] KEELC 1278 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2025**

AE DENA, J

MARCH 13, 2025

BETWEEN

JAMES AWUOR ADHIAMBO APPLICANT

AND

PHILLIP OWINO OCHIEL RESPONDENT

RULING

1. These proceedings were commenced by the applicant in person on 7th January 2025 by way of Chamber Summons dated 4th January 2015. Subsequently the firm of Oduol Achar & Co. Advocates came on record and adopted all the pleadings filed by the applicant in person.
2. The Notice of Motion application seeks that the applicant be granted leave to appeal out of time against the ruling and order delivered on 14/04/2023. The application is based on the grounds on its face and the supporting affidavit of James Awuor Adhiambo. It is deponed that on 7/12/23 this court granted leave to the firm of Oduor Achar & Co. Advocates to come on record for the applicant for purposes of filing an appeal out of time. This was to be done within 14 days. The order is attached as 'JA-1'. That they agreed with Mr. Oduol to meet on 13/12/2023. However on the material date he met one Mr. Francis Makewa who held out as Mr. Oduols legal assistant and that he had Mr. Oduols instructions to collect fees on his behalf. The applicant paid the legal fees. The receipt is annexed as 'JA-2'.
3. It further deponed that the said Mr. Francis Makewa later forwarded to him documents through a cyber café indicating Mr. Oduol was ready to lodge the appeal and further sought for a payment of Kshs. 50,000/- for filing of written submissions. The applicant decided to attend court where he discovered he had been swindled and no such appeal had been lodged. That on this discovery the applicant was advised by Mr Oduol Aluoch advocate to move the court and explain in detail what had transpired following the leave granted by the court.



4. The Applicant pleads with the court an opportunity to have the suit litigated on merit in view of the interlocutory judgement entered in the lower court. That he was unrepresented and did not understand much as a layperson. That the judgement has a potential of rendering him landless. That his appeal raises triable issues. A memorandum of Appeal is attached 'JA-3'. That his failure to meet the timeliness set by this court was not deliberate. That the respondent is unlikely to suffer any prejudice.
5. The application is opposed by the replying affidavit of Philip Owino Ochiel sworn on 17th February 2025. It is deponed that the application is resjudicata since a similar application dated 19/07/2023 was filed before this court by the firm of Oduol Achar & Co. Advocates concerning the same parties and subject matter and a ruling delivered by A.Y Koross J on 7/12/2023. The present application is termed as frivolous, malicious and a waste of the courts time. The application and the courts ruling is annexed as 'P.O.O 1'a' and 'b'.
6. Listing the verbatim orders of the court in the said ruling it is stated that the same were explicit that the Memorandum of Appeal and record of appeal be filed within 14 days failure to which the order granting leave to file the appeal would automatically vacate. That court orders ought to be complied with strictly and are not made in vain. That it is the duty of the litigant to constantly check with their advocate the progress of their case. That there must be an end to litigation and it behooves this court to inform the applicant and his advocate accordingly. That the doctrine of res judicata is to lock out a party who has already had his day in a court of competent jurisdiction from re-litigating the same issues. That the applicant has not come to court with clean hands.
7. The application was canvassed by way of written submissions. It was noted that the applicant had gone ahead of the court and filed their submissions alongside the application. These were dated 6/01/25 and were re-uploaded in the CTS by the firm of Oduol Achar on 12/2/2025. The respondents filed their submissions on 18/02/2025. The court has considered the submissions.

Determination

8. Having considered the application and the opposition thereto including the submissions for and against the application the following issues fall for determination
 1. Whether the application is resjudicata
 2. If the answer to the above is in the negative is the application merited?
9. The legal provisions on the doctrine of res judicata are set out under Section 7 of the [Civil Procedure Act](#) 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”.
10. The threshold to be met for a suit to be termed as being res judicata was enunciated by the Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), and which spells out the factors to be considered as follows;

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;



- 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.
11. In *Uhuru Highway Development Limited –versus Central Bank of Kenya & 2 others* [1996] eKLR, the Court held inter alia that, in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; The parties were the same or litigating under the same title; A competent Court heard the matter in issue and the issue has been raised once again in a fresh suit.
 12. My task therefore is to look at the present proceedings and the former proceedings in ELC Land Misc. Case No. E001 of 2023 (OS). In the former proceedings the only difference is that the same were by way of Originating summons however the parties are the same. James Awuor features in both matters as the applicant and the respondent is Philip Owino Ochiel who are the same parties in the present suit and the same parties in the lower court proceedings. In both suits orders sought by the applicant were for leave to file an appeal out of time over the same judgement and decree emanating from Chief Magistrates Court Siaya ELC E010 of 2021 delivered on 12/04/2023. In the former suit my sister A. Y. Koross granted the prayers sought with conditions attached thereto. The same issues have been raised in the present fresh proceedings.
 13. I note that the leave to file the appeal out of time was granted, however the same was to be filed within 14 days together with the record of appeal. There is no dispute that this court was a court of competent jurisdiction which jurisdiction is donated by section 79G of the *Civil Procedure Act*.
 14. Clearly from the foregoing the present suit is resjudicata.
 15. Each case is decided upon its own facts and merits. I noted as a court what happened indeed happened and the conditions set down by the court were not complied with and the orders for dismissal automatically kicked in. What options were available to the applicant? I think the 1st option would have been to move the court for review under the provisions of Order 45 Rule 1 which stipulates as follows;-
Any person considering himself aggrieved—
(1)
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



16. But having stated the foregoing that is an issue of procedure which in my view should not cloud substantive justice. I'm emboldened by the holding in *Patel v E.A. Cargo Handling Services Limited* [1974] E.A. 75 where the court stated:
- “There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
17. Since discretion must be exercised judiciously, I pondered over whether there are exceptions to the rule of res judicata. I found guidance in the following cases.
18. In *Mumira v Attorney General (Constitutional Petition E007 of 2020)* [2022] KEHC 271 (KLR) (8 April 2022) (Ruling) where Justice Mativo cited the case of *Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party)* where the High Court after reviewing decided cases held that exceptional circumstances such as fraud, mistake or lack of jurisdiction may constitute special circumstances to remove the operation of the doctrine of res judicata.
19. In the case of *Justine Masolo Nyakundi v Attorney General & another* [2022] eKLR – Mrima J cited the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR stated thus;-
20. The Supreme Court also discussed two exceptions to the doctrine of res judicata. The Court stated as follows: -
- (84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
- (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.
21. Arising from the foregoing dictum it is clear that substantial justice and avoidance of causing injustice should be the overarching consideration when exercising the discretion to apply the exception. I'm aware that the court is called to be cautious to ensure there is no danger of obstruction of justice. I have read the ruling by my sister Koross J which allowed the filing of an appeal out of time. The Applicant has explained the events that led to the failure to meet the deadline set by the court. He depones he was duped into believing that he was dealing with his Counsel. For me I think these are special circumstances that would warrant the exercise of the discretion herein.
22. The upshot of the foregoing is that this court exercises its discretion to reinstate the orders granting leave to the applicant to file an appeal out of time against the ruling in Chiefs Magistrates Court at Siaya ELC E010 of 2021 delivered on 12th of April 2023. The following orders shall hereby issue: -



- a. The applicant is granted leave to file an appeal out of time against the ruling in Chiefs Magistrates Court at Siaya ELC E010 of 2021 delivered on 12th of April 2023.
- b. The Memorandum and Record of Appeal shall be filed within 14 days of the date of this ruling
- c. Costs are awarded to the Respondent.
- d. This file is hereby closed.

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF MARCH 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

13/03/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ochanyo for the Applicant

Mr. Oduol for Respondent

Court Assistant: Ishmael Orwa

