



**Cheruiyot v Siror (Environment & Land Case 117 of 2016)  
[2023] KEELC 21794 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21794 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 117 OF 2016  
FO NYAGAKA, J  
NOVEMBER 28, 2023**

**BETWEEN**

**JEREMIAH CHERUIYOT ..... PLAINTIFF**

**AND**

**MICHAEL BETT SIROR ..... DEFENDANT**

**RULING**

1. While this matter was proceeding for the hearing of an Application dated 12/08/2022 filed by the Plaintiff, the Defendant raised a number of arguments and depositions which pointed to a possibility that the suit is *res judicata*. In the Application the Plaintiff had moved this Court to stay the execution of its orders made on 07/07/2022. The orders were of dismissal of an application for a temporary injunction against the Defendant, denial of leave to enjoin other parties in the suit and a further order that the parties herein address the Court on whether or not the suit was *res judicata*.
2. Following the delivery of the ruling, the Plaintiff filed a Notice of Appeal against it and thereafter made the Application. In was in the course of giving the directions for the hearing of the Application that the Court made further directions that the parties first address the issue of *res judicata* since its merits or otherwise would go to the existence of the main suit. The parties indeed made written submissions on the same.
3. This Court has deeply considered the issue of the directions, the Notice of Appeal and the Content of the Application dated 12/08/2022. In particular, it has considered the annexure marked JC-2 to the Supporting Affidavit Jeremiah Cheruiyot sworn on the same date as the Application. The annexure is a Draft Memorandum of Appeal drawn regarding the ruling of this Court that was delivered on 07/07/2022. One of the grounds proposed to be taken up on appeal in the intended appeal, as per the annexure at paragraph 12 is whether or not this Court erred in law or fact in directing the parties to submit on *res judicata* which, according to the Applicant is a weighty issue was not the main issue in the application which was dismissed.



4. Given that that is the case, this Court is of the view that for it to determine the issue of res judicata at this stage without first determining whether or not to grant a stay of execution in this matter pending the hearing and determination of the intended appeal yet the intended appeal might touch on the issue if the parties choose to pursue it on the appeal would amount to indirectly depriving the Applicant his right to move this Court, or even the Court of Appeal, on whether or not to stay the proceedings herein pending the determination of the ground mentioned in paragraph 12. That would be akin to indirectly determining that the Applicant has no right to move this Court appropriately and then later determine on the same issue of stay of proceedings by handling the Application.
5. In *George Kamau Kimani & 4 Others...vs...County Government of Trans Nzoia & Another* (2014), eKLR, the Court held:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

6. This Court agrees with the reasoning of the learned trial judge in that authority. The argument on res judicata is always hinged on factual matters which can only be raised by way of an application in which the applicant outlines the law that has been breached and the manner in which it has been breached. That then gives opportunity to the other party to respond appropriately, if they so wish, or they concede.
7. For the reasons above this Court is of the view that the order that the parties address it first on the issue of res judicata is hereby vacated. The parties are hereby directed to appear before this Court on 13/12/2022 when directions on the hearing of the application dated 12/08/2022 shall be given.
8. It is hereby order further that since the issue of res judicata as provided for in Section 7 of the *Civil Procedure Act*, is not a preliminary point of law which can be raised without a party formally applying and stating the facts in support thereto, the Defendant is at liberty to consider making a formal application on it except if there be an order staying the proceedings herein. Further, since there were no interim orders of stay of execution granted herein pending the hearing and determination of the application dated 12/08/2022, none are granted pending the mention of the same on 13/12/2023.
9. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 28<sup>TH</sup> NOVEMBER, 2023.**

**HON. DR. *IUR* FRED NYAGAKA**

**JUDGE**

