



Barngetuny (Suing the administrator of Estate of the Late Gideon Gari Kibarono alias Gari Kibarno) v Kirwa & another (Sued as beneficiaries and/or personal representatives of the Estate of the Late Sawe arap Cheruiyot alias Sawe Kipchomber (Deceased)) (Environment and Land Appeal 113 of 2021) [2022] KEELC 15328 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 113 OF 2021**

MN MWANYALE, J

DECEMBER 7, 2022

BETWEEN

NOAH KIPKOSGEY BARNGETUNY (SUING THE ADMINISTRATOR OF ESTATE OF THE LATE GIDEON GARI KIBARONO ALIAS GARI KIBARNO) PLAINTIFF

AND

STEPHEN KIPSS KIRWA 1ST DEFENDANT

THOMAS KIMARU SAWE 2ND DEFENDANT

SUED AS BENEFICIARIES AND/OR PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE SAWE ARAP CHERUIYOT ALIAS SAWE KIPCHOMBER (DECEASED)

RULING

1. The respondent filed notice of preliminary objection dated October 18, 2022 in opposition to the application dated October 3, 2022 in which the applicant sought the following orders;
 - i. The applicants be granted leave to appeal out of time.
 - ii. The honourable court be pleased to extend time for lodging of a memorandum of appeal and record of appeal against the judgement of Hon Justice M N Mwanyale delivered in the Environment and Land Court at Kapsabet on May 31, 2022.
 - iii. The notice of appeal dated June 7, 2022 be deemed as property filed.
 - iv. The costs of and incidentals to this application abide the result of the appeal.



2. The respondent opposed the application by filing a notice of preliminary objection in which he contends that;
 - i. The defendants application dated October 3, 2022 offends the mandatory provisions of section 7 of the [Civil Procedure Act](#), cap 21 of the Laws of Kenya.
3. On October 18, 2022 parties agreed to canvass the preliminary objection by way of written submissions. Both parties complied.
4. In the respondent’s counsel written submissions dated October 19, 2022 and filed on October 21, 2022, it was submitted that the application by the defendant/applicant was an abuse of the court process as it offends the provisions of section 7 of the [Civil Procedure Act](#) which sets out the doctrine of *res-judicata*. Counsel relied in the case of [E T v Attorney General and Another \(2012\) eKLR](#) and [Gurbachan v Yowani Ekori \(1958\) E A 450](#) to buttress their position.
5. Opposing the preliminary objection, counsel for the application submitted vide their submissions filed on November 10, 2022 that their application dated October 3, 2022 was not *res-judicata* but a fight for justice. Counsel further submitted that their intention was not to litigate a concluded application but seeking leave of court to file an appeal out of time. That their appeal is merited with high chances of success and dismissing their application would deny applicants right they cited [Maina Mwangi v Waweru Peter \(2015\) eKLR](#) in support of this argument.

Analysis and Determination: -

6. The sole issue for determination is whether the application dated October 3, 2022 is *res-judicata* as alleged in the instant preliminary objection.
7. The doctrine of *res-judicata* is embedded under section 7 of the [Civil Procedure Act](#) which provides 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.”

8. The Court of Appeal in the case of [John Florence Maritime Service Limited and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others \(2015\) eKLR](#) laid out the ingredients of *res-judicata* as follows;

“.....the ingredients of *res-judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.”



9. Apart from the ingredients of res-judicata, it is important to re – state the rationale of this doctrine as set out in the case of the [Independent Electoral and Boundaries Commission v Maina Kia and 5 Other \(2017\) eKLR](#) where the Court of Appeal held;

“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 for a, 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 to calumny. The foundation of resjudicata thus rests in the public interest for swift, sure and certain justice.”

10. Applying the foregoing to the present case, this court must determine whether the respondent has met all the ingredients of the doctrine of res judicata.
11. It is without a doubt and not in dispute that the parties in application dated October 3, 2022 and the one dated July 4, 2022 which was determined on September 29, 2022 are similar. Also that this court incompetent to try the instant application being objected to by the respondent.
12. The only ingredient this court is left to interrogate is whether the issue in the application dated October 3, 2022 is directly and substantially in issue in application dated September 29, 2022.
13. Looking at the record, the application dated July 4, 2022 and determined on September 29, 2022 dealt with stay of execution of judgement of this court delivered on May 31, 2022 pending hearing and determination of appeal. This court disallowed the application on the basis that the notice of appeal was filed out of time without leave of court.
14. The application dated October 3, 2022, that is pending before this court is hinged on the following prayers;
- i. Spent
 - ii. The applicants be granted leave to appeal out of time.
 - iii. The honourable court be pleased to extend time for lodging of memorandum of appeal and record of appeal against the judgement of Hon Mr Justice M N Mwanyale delivered in the Environment and Land Court at Kapsabet on May 31, 2022.
 - iv. The notice of appeal dated June 7, 2022 be deemed as property filed.
15. In my view, the issues in the present application and the previous application already determined and distinct for the following reasons.
16. First the prayers sought are plainly dissimilar. The previous application sought for stay of execution pending appeal while the present application is for leave to appeal out of time.
17. Secondly, this court *vide* its ruling rendered on September 29, 2022 cited the reason for denying stay of execution as to the fact that the notice of appeal was out of time without leave of court. This was just a mere mention and not a final and substantial determination of the issue of leave of court to appeal out of time as is required under the ingredients of res judicata principle. This court did not probe the principles for leave to appeal out of time such as the period of delay in filing appeal, the reason for



delay or the chances of appeal succeeding as well as degree of prejudice on parties involved. Allowing the present preliminary objection would mean condemning the applicant unheard on the above.

18. Therefore, since the ingredients of the doctrine of res-judicata have to be satisfied conjunctively, failure of meeting this ingredient affects all the other ingredients that were duly met as aforementioned.
19. Consequently, I find that the respondent has failed to satisfy all the ingredients for the application of the doctrine of res judicata. I dismiss the preliminary objection dated October 18, 2022 the application dated October 3, 2022 shall be heard and determined on its merits; parties to file written submissions by December 20, 2022 when the matter shall be mentioned to take a ruling date on the application.

DATE AT KAPSABET THIS 7TH DAY OF DECEMBER, 2022.

HON M N MWANYALE,

JUDGE.

In the presence of;

Mr Rugut holding brief for Ms Isiaho for respondent

No appearance for Mr Ondieki for Defendant

