



**Rick v Chebet & another (Environment & Land Case
E232 of 2023) [2025] KEELC 4064 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E232 OF 2023**

JO MBOYA, J

MAY 28, 2025

BETWEEN

BRYAN MICHAEL RICK PLAINTIFF

AND

JAMES CHEPKOIYWA CHEBET 1ST DEFENDANT

ARNOLD MASWA 2ND DEFENDANT

RULING

1. The Defendants/Applicants [hereinafter referred to as the Applicants] have approached the court vide the application dated the 4th of April 2025 and wherein the Applicants have sought the following reliefs:-
 - a. That the honourable court be pleased to certify the application urgent and to hear it Ex-parte in the first instance.
 - b. That this Honourable court be pleased to stay further proceedings of the suit pending hearing and determination of the application.
 - c. That this honourable court be pleased to issue an order of joining Jane Too as a necessary part to the suit.
 - d. That the Honorable court be pleased to issue an order setting aside the orders of [sic] 5th November 2025 and order for the suit to start de novo for a fresh hearing.
 - e. That the costs of the Application be provided for.
2. The subject application is premised on the various grounds which are enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one James C. Chebet, sworn on the 4th of April 2025 and wherein the deponent has reiterated the grounds contained at the foot of the



- application. In particular, the deponent has averred that the subject matter proceeded for hearing on the 5th of November 2024 [but which has erroneously captured as 5th of November 2025].
3. The Plaintiff/Respondent filed grounds of opposition dated the 9th of April 2025 and wherein same has contended that the subject application is not only prohibited by the doctrine of res judicata, but that same also constitutes an abuse of the due process of the court. In addition, the Plaintiff has also stated that the application beforehand is merely intended to vex the Plaintiff/Respondent.
 5. The application beforehand came up for hearing on the 27th of May 2025, whereupon the advocate for the parties covenanted to canvass and dispose of the same by way of oral submission. To this end, the court allowed the application to proceed and the submissions canvassed [ventilated] by the various parties are on record.
 6. Learned counsel for the Defendants/Applicants [hereinafter referred to the Applicants], adopted the grounds at the foot of the application and reiterated the contents of the supporting affidavit. Moreover, learned counsel proceeded to and highlighted the one single issue, namely, that the Applicants are craving for an opportunity to be heard in respect of the instant matter.
 7. As pertains to the foregoing position, learned counsel submitted that even though the applicants had previously engaged and instructed an advocate, the said advocate filed an application to cease acting. Nevertheless, it has been posited that the said application was not served on the Applicants up to and including the date when the matter came up for hearing.
 8. Arising from the foregoing, learned counsel for the Applicants has therefore implored the court to find and hold that the proceedings that were taken on the 5th of November 2025 [but which should be 5th November 2024], were taken without the involvement of the Applicants. To this end, learned counsel reiterated that the Applicants are seeking an opportunity to be heard in accordance with the provisions of Article 50 of the Constitution.
 9. The Plaintiff/Respondent adopted the contents of the grounds of opposition dated the 9th of April 2025 and thereafter sought to canvass and highlight three (3) salient issues, namely, that the application for setting aside the proceedings of 5th November 2024 are res judicata; the limb of the application seeking joinder of Jane Too, is equally res judicata; and the entire application constitutes an abuse of the due process of the court.
 10. Regarding the first issue, namely; that the application for setting aside the proceedings of 5th November 2024 are res judicata, learned counsel submitted that the applicants herein proceeded to and filed the application dated 13th of November 2024, wherein the applicants sought various reliefs; and in particular, a prayer for setting aside of the proceedings of the 5th of November 2024.
 11. Moreover, learned counsel submitted that the said application was duly canvassed before the court culminating into the ruling which was delivered on the 16th January 2025 and wherein the court found and held that the application to set aside the impugned proceedings was, inter-alia, devoid of merit[s]. In any event, learned counsel has submitted that the court found that the impugned proceedings were not ex-parte proceedings and hence same did not lend themselves to setting aside either in the manner sought or otherwise.
 12. Arising from the foregoing, it has been submitted that the current application is therefore barred by the doctrine of res judicata. To this end, learned counsel for the Respondent has cited and referenced the provisions of Section 7 of the civil procedure act, Chapter 21, Laws of Kenya.
 13. Regarding the second issue, namely, the limb of the application seeking joinder of Jane Too, is equally res judicata, learned counsel contended that the Applicants herein had similarly filed an application



- dated the 11th of June 2024 and wherein same sought to join Jane Too as a 3rd party. Furthermore, it has been submitted that the said application was equally heard and disposed of vide Ruling rendered on the 16th of September 2024.
14. To this end, learned counsel has therefore implored the court to find and hold that the limb of the application now seeking joinder of Jane Too as [sic] a necessary party, is equally res judicata. In any event, it has been submitted that the said limb of the application is also an abuse of the due process of the court.
 15. As pertains to the third issue, learned counsel for the Respondent has submitted that the Applicants herein have been guilty of filing several applications in the matter whose intention is to frustrate the crafting of the judgment in respect of the instant matter. In particular, it has been submitted that the totality of the applications filed constitute a deliberate attempt to frustrate the expeditious disposal of the subject matter.
 16. Finally, learned counsel for the Respondent has submitted that the limb of the application seeking for review of the orders of the court is premature and untenable in so far as the Applicants herein have previously filed and lodged a notice of appeal dated the 29th of January 2025; and wherein same have sought to challenge the ruling of the court delivered on the 16th of January 2025.
 17. Owing to the fact that the Applicants herein have already filed a notice of appeal against the said decision, it has been contended that the Applicants herein cannot now be heard to seek review of the orders of the court and by extension the setting aside of the proceedings of 5th November 2025. To this end, Learned Counsel cited and referenced the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010.
 18. Having reviewed the application, the grounds of opposition and upon taking into account the oral submissions made on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on two (2) key issues, namely:- whether the application is prohibited by the doctrine of res judicata and by extension the provisions of Section 7 of the Civil Procedure Act, 2010; and whether the application constitutes an abuse of the due process of the court.
 19. Regarding the first issue, namely; whether the application is prohibited by the doctrine of res judicata and by extension the provisions of Section 7 of the Civil Procedure Act, 2010, it is imperative to state and observe that the advocates for the parties herein appeared before the court on the 16th of September 2024 whereupon the advocates covenanted to have the suit fixed for hearing on two (2) days. This instant suit was then fixed for hearing on the 5th of November 2024 and the 7th of November 2024.
 20. Come the 5th of November 2024, learned counsel for the Defendants applied for an adjournment on various reason[s] whose details are well captured and enumerated on the body of the proceedings taken on even date. Suffice to state that the application for adjournment was declined. Thereafter, learned counsel for the Applicant walked out of the proceedings and ceased to participate.
 21. Be that as it may, the proceedings of the court went on and the Plaintiff proceeded to and testified. Additionally, the plaintiff closed his case. To the extent that the Defendants were not present despite having being privy to the scheduled hearing date, the court proceeded to and closed the defence case.
 22. Dissatisfied with the proceedings which were taken on the 5th of November 2024, the Applicants herein filed an application dated the 13th of November 2024 and wherein same sought various reliefs. For good measure, one of the reliefs that was sought at the foot of the said application was the setting aside of the proceedings of 5th November 2024.



23. The said application namely, the application dated the 13th of November 2024 was thereafter canvassed and disposed of vide Ruling dated the 16th of January 2025, wherein the court found and held that the application was devoid of merits. Notably, the court proceeded to and dismissed the application.
24. Having filed a previous application dated the 13th of November 2024, seeking the setting aside of the proceedings of 5th November 2024, there is no gainsaying that the Applicants herein cannot revert to court and file a similar application. To my mind, the filing of the current application runs contrary [afoul] to and in contravention of the doctrine of res judicata. Suffice to state that a party, the Applicants not excepted, can only have one bite on the cherry of justice.
25. As pertains to the import and tenor of the doctrine of res judicata, it is instructive to cite and reference the decision in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR, where the Court of Appeal stated as herein:-

“Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) stated:

“QUOTE{startQuote “{

Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

26. The Supreme Court on its part has also pronounced itself on the import and legal implication of doctrine of res judicata. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court stated thus:-
 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.



55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of the *Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”
57. The essence of the res judicata doctrine is further explicated by Wigam, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].
58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

27. Furthermore, the court ventured forward and stated thus;-

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J,



in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

28. Surely, the Applicants herein cannot be heard to revert to this court with an application seeking similar orders like the ones that were sought at the foot of the application dated the 13th of November 2024 and which application was indeed disposed of vide the Ruling delivered on the 16th of January 2025. Quite clearly, the instant application is res judicata.
29. Similarly, it is worthy to recall that the Applicants herein had filed a previous application dated the 11th of June 2024 and wherein same sought to issue and serve a third party notice against Jane Too. For good measure, the said application was heard and disposed of vide the Ruling rendered on the 16th of September 2024.
30. It is instructive to note that the basis upon which the Applicants had sought to take out third party notice against the said Jane Too was because it was contended that same [Jane Too] had sold the suit property to the Applicants. In addition, it was posited that her joinder was necessary to enable the court to adjudicate upon and determine all the issues in dispute.
31. Suffice to state that the said application was heard and disposed of. Having heard the opportunity to canvass the application for joinder of a third party, I hold the view that the Applicants herein cannot now undertake a cosmetic face lift on the matter and approach the court to join the said Jane Too as a necessary party. This limb of the application is also prohibited by the doctrine of constructive res judicata [See Section 7, explanation 4 of the [civil procedure act](#)].
32. Before concluding on this aspect, it is not lost on the court that the Applicants herein had also filed a suit namely; ELC Number 291 of 2012 against Jane Too and wherein the same issues in dispute were raised.
33. Nevertheless, the said suit was dismissed for want of prosecution and the order dismissing the suit for want of prosecution has neither been impugned, varied and/or set aside. Simply put, it then means that no further proceedings can be taken as against the said John too on the face of the dismissal of the suit against her for want of prosecution. [See the decision in the case of Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] KECA 788 (KLR).
34. Regarding the second issue, namely, whether the subject application constitutes an abuse of the due process of the court, it is worthy to recall and reiterate that the Applicants herein have filed a plethora of applications in respect of the subject matter. Furthermore, it is not lost on the court that most of the applications have been filed on the eve of the scheduled hearing.
35. Other than the foregoing, it is evident that the current application which substantially replicates the applications dated 11th of June 2024 and 13th of November 2024, is calculated to defeat the crafting and delivery of the pending judgement. In any event, it is clear from the record of the court that the advocates beforehand had appeared before learned Justice C.G. Mbogo on the 26th of March, 2025; and wherein the Judge ordered and directed that the file beforehand be placed before this court for purposes of crafting the pending Judgment. Instructively, the orders under reference were made in the presence of the applicant’s counsel.
36. Back to the issue of abuse of the due process of court. It is pertinent to observe that abuse of the court process takes various perspectives. Nevertheless, the key features of abuse of court process arise where



a party seeks to use the process of the court for collateral purposes. Furthermore, abuse of the court process will also entail the filing of a multiplicity of suits or applications, whose import is to obstruct, delay and/or defeat the due process of the court, or better still, to antagonize/ vex the adverse Party; or the Court.

37. What constitutes abuse of the due process of the court has been elaborated in various court decisions. However, it is instructive to cite and reference the holding in the case of *Muchanga Investments Ltd V Safaris Unlimited (Africa) LTD & 2 others* [2009] eKLR, where the Court of Appeal stated and observed as hereunder:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

38. Moreover the court ventured forward and highlighted aspects that would amount and/or constitute abuse of the due process. The court stated as hereunder:-

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic) meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

39. The Supreme Court on its part has also added its voice to what constitutes an abuse of the due process of the court. To this end, it is imperative to take cognizance of the holding in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others* (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling), where the supreme court stated as hereunder:-

27. In *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others* Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia: “The concept



of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

40. I do not wish to exhaust all the decision wherein the concept of abuse of due process of the court has been highlighted. However, it is apposite to take cognizance of the holding in the case of *Satya Bharna Vs Director Public Prosecution* [2018] eKLR], where Justice Mativo [judge as he then was], aptly stated as follows:-
26. It’s settled law that a litigant has no right to pursue two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.
27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process.”[17]
28. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[19]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.
41. Without belaboring the point, I come to the conclusion that the current application constitutes an abuse of the due process of the court. Quite clearly, the applicants herein appear to have hatched a plot or scheme wherein same are intent on frustrating the expeditious hearing and disposal of the dispute beforehand.
42. Suffice to state that the scheme under reference seems to be propagated with the help of the counsel on record, who certainly ought to have known better. I say, who certainly ought to have known better because of the import of the provisions of Sections 55 and 56 of the *Advocates Act*, Chapter 6, Laws of Kenya, that constitutes advocates as officers of the court.
43. Additionally, it is not lost on me that both the advocate for the Applicants and the Applicants themselves also have an obligation to the court in the manner propagated vide Section 1B of the *Civil Procedure Act*.



44. Sadly, it appears that we have reached our lowest in an endeavor to defeat the due process of the court and by extension the rule of law.

Final Disposition:

45. Flowing from the analysis contained in the body of the ruling, it is apparent that this court has found and held that the application beforehand is devoid and bereft of merits. Furthermore, there is no gainsaying that the subject application constitutes a classic abuse of the due process of the court.

46. In the premise, the final orders that commend themselves to the court are as hereunder:-

- a. The application dated the 4th day of April 2025; be and is hereby dismissed.
- b. Costs of the Application be and are hereby awarded to the Plaintiff/Respondent.

47. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI ON THE 28TH DAY OF MAY, 2025.

OGUTTU MBOYA, FCI Arb, CPM [MTI].

JUDGE.

In the presence of:

Brandy – Court Assistant.

Mr. Sinjiri Kipkurui for the Defendants/Applicants.

Mr. Ojiambo for the Plaintiff/Respondent.

