Iderus v Hussein & 10 others (Environment & Land Miscellaneous Case E002 of 2025) [2025] KEELC 3285 (KLR) (10 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3285 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2025

JO MBOYA, J

MARCH 10, 2025

BETWEEN

MOHAMED SHARIF IDERUS ..... APPLICANT

AND

MOHAMED ALI HUSSEIN ..... 1ST RESPONDENT

MOHAMED NOOR OMAR ..... 2ND RESPONDENT

GOLICHA HASSAN FOLICHA ..... 3RD RESPONDENT

ADEN HAJIR BASHIR ..... 4TH RESPONDENT

AHMED YUSSUF ..... 5TH RESPONDENT

HUSSEIN ABDIWAHAB ..... 6TH RESPONDENT

SAMOW IDERUS ..... 7TH RESPONDENT

RAHA MUKTAR ..... 8TH RESPONDENT

MOHAMED SHARIFOW ..... 9TH RESPONDENT

SALO BOARA ..... 10TH RESPONDENT

ABDIKADIR SHARIF ..... 11TH RESPONDENT

RULING

1. The Applicant herein has approached the court vide Notice of Motion application dated 5th of February, 2025; and in respect of which the Applicant has sought the following reliefs [verbatim]:

    a. The Honorable Court do certify the matter as urgent in the first instance.

b. The Honorable Court be pleased to set aside and/or review dismissal orders delivered by Hon. Justice C. K. Yano on the 19th day of December, 2024.

c. The Honorable Court be pleased to say execution of the Judgment/Decree and all consequential orders of Senior Principal Magistrate in Tigania ELC No49A of 2022 delivered on 2nd March, 2023 pending the hearing of this Application.

d. The Honorable Court be pleased to grant the applicant extension of time to file an appeal against the Judgment/Decree of the Senior Principal Magistrate in TiganiaELC No49A of 2022 delivered on 2nd March, 2023 pending the hearing of this Application

e. Costs of the Application be provided for.

2. The instant application is anchored on the various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of Mohamed Sharrif Iderius [the applicant herein] sworn on 5th of February, 2025 and to which the deponent has annexed three [3] sets of documents including a copy of the Judgment that was rendered by the trial court and a copy of the ruling rendered by Hon. Justice C. Yano, Judge dated 19th of December, 2024.

3. Upon being served with the instant application, the 1st, 2nd and 3rd Respondents filed a Replying affidavit sworn on 21st February, 2025; and to which the deponent thereof has annexed various documents including a copy of the ruling rendered on 19th December, 2024. Furthermore, the 1st, 2nd and 3rd Respondents have also contended that the instant application is intended to enable the applicant to have a second bite on the cherry.

4. Additionally, it has been contended that the application for extension of time was equally heard and determined by Justice Yano, who found and held that the application had been made and/or mounted with unreasonable delay, which delay had neither been accounted for nor explained. To this end, it was posited that the application constitutes an abuse of due process of the court.

5. The application beforehand came up for hearing on 10th of March, 2025, whereupon the advocates for the respective parties covenanted to canvass the same by way of oral submissions. Suffice to state that the application indeed proceeded and the submissions by the parties are on record.

6. The applicant herein adopted the grounds contained in the body of the application, as well as the averments in the body of the supporting affidavits. Furthermore, the applicant proceeded to and highlighted two [2] issues, namely; that the applicant has since discovered new and compelling evidence, which was not within the knowledge and/or possession of the applicant; and that the applicant deserves to be afforded an opportunity to be heard.

7. Regarding the first issue, namely; that the applicant has obtained new and compelling evidence which was not within the possession of the applicant, it was contended that the applicant has since procured and obtained the affidavit of the assistant chief and which affidavit demonstrate[s] that the process server, who allegedly served the court process was not accompanied by the said assistant chief as contended/ averred in the affidavit of service.

8. Moreover, it was submitted that the affidavit of assistant chief, only came to possession of the applicant on the 3rd of February, 2025; and thus same [affidavit] could not be used by the applicant during the previous application which was heard and disposed of by Honourable Justice Yano.

9. It was the further submission of the applicant that the contents of the affidavit by the Assistant chief and which has been referenced in terms of paragraph 10 of the supporting affidavit, are critical and

thus impacts on both the judgment of the trial court as well as the ruling of this court [differently constituted]

10. Secondly, it has also been submitted that the applicant herein was condemned unheard, in so far as same [applicant] was not served with the court process. In this regard, it has been contended that the applicant is merely crying for an opportunity to be heard in respect of the instance matter.

11. Other than the forgoing, it was also submitted that the applicant herein is also seeking for an opportunity to cross-examine the process server who swore the affidavit of service as pertains to the matter in the Subordinate Court.

12. Premised on the foregoing, the applicant herein has implored the court to find and hold that the application beforehand is meritorious and thus same ought to be allowed.

13. The 1st, 2nd and 3rd Respondents adopted and relied upon the Replying affidavit sworn by the 1st Respondent on 21st of February, 2025; and thereafter highlighted three [3] salient issues, namely; the application beforehand is misconceived and constitutes an abuse of the due process of the court; that the applicant has neither established nor satisfied the requisite threshold for the grant of order[s] of review and lastly, that the application is devoid of merit.

14. In respect of first issue, learned counsel for the named Respondents has submitted that the applicant herein had previously filed an application for extension of time within which to file/lodge an appeal and which application was dismissed vide ruling delivered on 19th December, 2024. To the extent that the application for leave to appeal out of time was dismissed, it was submitted that the applicant herein ought to have preferred an appeal and not to come back to this court with a similar application.

15. To this end, it has been submitted that the filing of instant application constitutes and amounts to an abuse of the due process of the court and thus, the application beforehand ought to be dismissed.

16. Secondly, it has been submitted that though the application has been brought pursuant to provisions of Section 1A, 1B, 3A and 79G of the *Civil Procedure Act*, the application is essentially one for review. In this regard, it has been submitted that it was therefore incumbent upon the applicant to demonstrate to the court the discovery of new and important evidence,[if any] which was not within the possession and knowledge of the applicant at the time of delivery of the ruling under reference.

17. Nevertheless, it has been submitted that the evidence that is being relied upon by the applicant herein is neither new nor compelling. In any event, it has been submitted that the learned Judge was never concerned with the question of service of the court process upon the applicant, but the length of time that the applicant took before filing the application for leave to appeal out of time.

18. Additionally, it has been submitted that the new and important evidence, if any, must be evidence that impacts on the ruling and/or order that is sought to be reviewed and not otherwise. However, it has been submitted the purported new evidence being relied upon by the applicant does not impact upon the ruling that was delivered on the 19th December, 2024.

19. Finally, it was submitted that the application beforehand is merely intended to invite this court to re-engage with the question of leave to appeal out of time, which had been dealt with and disposed of by Hon. Justice C. Yano, Judge. To this end, it has been submitted that the application herein is intended to invite the court to sit on appeal on decision of a court of concurrent jurisdiction.

20. In view of foregoing, learned counsel for the named Respondents has invited the court to find and hold that the application beforehand, is not only premature, but same is also misconceived and constitutes an abuse of the due process of the court.

21. Having reviewed the application; the response thereto and the submissions on record, I come to conclusion that the determination of instant application rests/turns on three [3] key issues, namely; whether the applicant has met and satisfied the threshold for review or otherwise; whether the application for extension of time to file an appeal out of time is res judicata; and whether the application constitutes an abuse of the due process of the court.

22. Regarding the first issue, that is, whether the applicant has established and/or satisfied the requisite grounds for review, it is important to underscore that the reason for review must relate to and/or touch on the ruling that is sought to be reviewed and not otherwise. In this regard, the applicant was called upon to highlight and generate an issue that touched on and concerned the ruling that was rendered by the judge.

23. Suffice to state that learned judge did not address himself to the question as to whether or not service of the court process in the lower court was lawful or otherwise. In any event, there is no gainsaying that such an issue could only be dealt with by the trial court and not by the Judge, whose mandate was limited to addressing an application for leave to appeal out of time.

24. Arising from the foregoing, I come to the conclusion that the issue as to whether or not the Assistant Chief accompanied the process server to serve the court process in the original suit, does not constitute sufficient basis and/or grounds to warrant review of the ruling of the learned Judge, either in the manner sought or otherwise.

25. In respect of the second issue, namely; whether the application is res judicata, it is important to recall and reiterate that the applicant herein had filed a previous application dated 25th of July, 2024 and wherein the applicant sought for leave to file an appeal out of time.

26. The application under reference was heard and disposed of vide ruling rendered on 19th December, 2024; and whereupon the learned judge found and held that the application was devoid of merits. In this regard, the application dated 25th July, 2024 was dismissed.

27. Notwithstanding the foregoing, the applicant herein has now returned to court and same [applicant] is seeking to procure a similar order like the one which had been declined. Essentially, what the applicant is seeking is to the effect that this court should proceed to bypass the ruling rendered on 19th December, 2024 and to grant the leave which had been declined.

28. In my humble, albeit considered view, the question as to whether or not the applicant ought to procure and obtain leave to file an appeal out of time had been canvassed and addressed by a court of concurrent jurisdiction. In this regard, the same issue [namely, grant of leave to appeal out of time] cannot be re-agitated afresh.

29. Additionally, the applicant herein cannot re-clothe the application for leave to file an appeal out of time by including a limb for review in an endeavor to escape from the snares of the doctrine of res judicata.

30. Simply put, the application by the applicant herein is caught up by the doctrine of res judicata. [see the provisions of section 7 of the *Civil Procedure Act* as read together with order 3 rule 4 of the Civil Procedure Rules 2010].

31. Further and at any rate, the import and tenor of res judicata has been elaborated in various decisions. Suffice it to cite and reference the holding in the case of Kenya Commercial Bank Limited Vs. Muiri Coffee Estate Limited [2016]eKLR where the Supreme Court stated and held as hereunder:

> (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands

as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

(53) In Silas Make Otuke v. Attorney-General & 3 Others, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".

(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 Wigram, V-C in Henderson v. Henderson (1843) 67 E.R. 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].

32. Likewise, the extent and scope of res judicata was re-visited by the Supreme Court [the apex Court] 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

> 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....."
>
> 59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:a)There is a former Judgment or order which was final;b)The Judgment or order was on merit;c)The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; andd)There must be between the first and the second action identical parties, subject matter

> and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)

33. Arising from the foregoing, I come to the conclusion that the application beforehand is indeed prohibited by the doctrine of res judicata. To this end, the applicant cannot seek to have a second bite on the cherry, as far as the issue of grant of leave to appeal out of time is concerned

34. Respecting the third issue, it is imperative to recall that the judge who entertained the previous application for leave to appeal out of time and thereafter, dismissed same was occupying the same portfolio or better still, a court of concurrent jurisdiction. In this regard, it is common ground that this court cannot by any chance purport to sit on appeal on the decision of a court of a concurrent jurisdiction.

35. Such an endeavor [if at all] shall not only amount to an absurdity, but shall be tantamount to inviting anarchy into the corridors of justice. [see the decision of the Supreme Court of Kenya in the case of Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020*) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) at paragraph 55 thereof]

36. Be that has may, I hold the opinion that the instant application is a deliberate and intentional scheme to defeat the ruling of the learned Judge. To this end, there is no gain saying that the application constitutes and amounts to an abuse of due process of the court.

37. What constitutes an abuse of the due Process of the court has received judicial preannouncements in various/ diverse decisions. In the case of Muchanga Investments Ltd vSafaris Unlimited (africa) Ltd& 2 others [2009] eKLR the Court of Appeal stated has hereunder;

> To re-inforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:
>
> > "The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."
>
> In Beinosi vWiyley1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-
>
> > "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 vBagudo1998 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.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

> "The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

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."

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

38. Flowing from the foregoing analysis and taking into account the ruling rendered on the 19th of December, 2024, I come to the conclusion that the subject application [which seeks similar reliefs] constitutes an abuse of the due process of the court.

Final Disposition:

39. Having reviewed and calibrated upon the issues, which were highlighted in the body of the ruling, it is apparent that the application beforehand is not only misconceived, but same also constitutes an abuse of the due process of the court.

40. Consequently, and in the circumstances, the final orders of the court are has hereunder;

    i. The Application dated 5th of February, 2025; is devoid of merits and same be and is hereby dismissed.

    ii. Costs of the Application be and hereby awarded to the 1st, 2nd and 3rd Respondents.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH MARCH, 2025.

OGUTTU MBOYA,

JUDGE.

In the presence of;

Mr. Mutuma – Court Assistant

Ms. Gacheri holding brief for Mr. Nkunja Kaberia for the 1st, 2nd and 3rd Respondents.

Mr. Otieno C for the Applicant

No appearance for the rest of Respondents.