



Githu v Kenya Com Rabbit Consortium Limited (Environment and Land Appeal E050 of 2022) [2025] KEELC 5271 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E050 OF 2022**

JA MOGENI, J

JULY 7, 2025

BETWEEN

ELIZABETH WANJIKU GITHU APPELLANT

AND

KENYA COM RABBIT CONSORTIUM LIMITED RESPONDENT

RULING

1. The Court is called upon to determine a Notice of Motion Application dated 21/01/2024 seeking stay of execution of orders made in MCELC Case No. 32 of 2019 and also seeking to have the law firm of Mukuria & Company Advocates to come on record for the Appellant. The Application is brought under the provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 9 Rules 9 and 10; Order 51 and Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law.
2. The grounds are on the face of the application dated June 6, 2022 and are listed as in paragraphs (A) to (H). I do not need to reproduce them here. The said application is supported by an Affidavit and Further Affidavit both sworn by Stephen Mbithi Mwikya, the Plaintiff/Applicant herein on June 6, 2022 and June 23, 2022 respectively.
3. The Application is opposed. There is a Replying Affidavit sworn by KARIUKI RUNYENJE ROBINSON the General Manager of the Respondent Company sworn on 7/03/2024.
4. When the Application came up before this Court for determination, I gave direction for its disposal by way of written submissions. The Appellant/Applicants filed their written submissions dated 18/11/2024. The Respondent filed their written submissions dated 7/04/2025.
5. The background of the matter is that the Appellant has filed an appeal against the Judgment delivered on 26/05/2022 in MCELC Case No. 32 of 2019 wherein the Court decreed that the Appellant herein



refunds Kesh 3,970,000 to the Respondent together with interest at commercial rates from the date of payment until payment in full plus costs and interest of the suit.

6. The Appellant/Applicant being aggrieved by the said Judgment proceeded to file the instant Appeal where she avers that she has an arguable appeal with good chance of success and that the execution of the Judgment will cause her to lose her home.
7. On their part the Respondents have argued that the application is an abuse of the Court process, malicious and only meant to annoy the Respondents since the Appellant had filed a similar application vide the Notice of Motion Application dated 23/06/2022 and she attached a copy marked A. The application was heard and Ruling delivered dismissing the application for stay and the Memorandum of Appeal was struck out and the file closed.
8. The Respondent states that the Appellant did not prefer an Appeal or a Review of the said orders referred to in paragraph {{>#arguments para_7 7}} above. This being the case the Applicant cannot rely on the said Memorandum of Appeal since it was struck out.
9. That therefore the application for stay is res judicata. Further that this application has been brought after 18 months after delivery of Judgment and this is inordinate delay. It is the Respondent's position that even the Applicant has not met the conditions for stay of execution as no security for due performance has been offered or proposed.
10. The Respondent contends that the Applicant is abusing the Court process by using proxies to file parallel proceedings just to frustrate the Respondent and that there should be an end to litigation to allow the decree holder enjoy the fruit of the Judgment. He implored the Court to dismiss the application.

Analysis and Determination

11. I have considered the Appellant's application herein and the Respondent's as well as their written submissions and the law.
12. Indeed it is not in dispute that Judgment in the trial Court in Kiambu MCELC Case No. 32 of 2019 was rendered in favour of the Respondent. That the Appellant/Applicant herein having been dissatisfied with the said determination sought to appeal against it and in the interim to seek for a stay of execution of the said Judgment and Decree pending the determination of the Appeal.
13. The Court noted that the Appellant/Applicant's application had two (2) limbs for determination. One was for an order for stay of execution pending appeal and the other was for the order for granting leave to the law firm of Mukuria & Company to come on record for the Appellant. There is also the issue that has been raised by the Respondent about the application being res judicata since the issue of stay was determined vide a Ruling on 19/12/2022 by a Court of competent jurisdiction.
14. I will start by examining the issue of res judicata first since it has been brought up and it touches on the jurisdiction of the Court to deal with an application which has already been determined.
15. The Respondent also raised an issue whether the suit was res judicata. The doctrine of res judicata is not novel. Its genesis is in Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya 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.”

16. The Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR comprehensively dealt with the different facets making up the doctrine of res judicata.

17. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. In the dicta in *Re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the Court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017]eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:”

- (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.”

18. In the case of *Attorney General & another ET vs* (2012) eKLR where it was held that: -

“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 form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of *Omondi s NBK & 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.”

19. In that case the Court quoted Kuloba J, (as he then was) in the case of *Njanju vs Wambugu and Another* Nairobi HCC 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 in every occasion he comes to Court, then I do not see the use of doctrine of res judicata ...”

20. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having



been determined on merits by a Court of competent jurisdiction. The Court in the English case of *Henderson v Henderson* (1843-60) All E.R 378, did observe that:

“... 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 under 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 case, 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.”

21. *Res judicata* applies to applications just like suits. In the case of *Julia Muthoni Githinji v African Banking Corporation Limited* [2020] eKLR, the Court stated thus:

“14. After a careful reappraisal of the application for injunction before the lower Court, I have come to the conclusion that the application was *res-judicata* and the entire suit was sub-judice as there was an active pending suit before a Court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate Court could be properly litigated in the suit pending before the ELC. The filing of the suit by the Appellant in the subordinate Court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.”

22. In *Maumbwa & 3 Others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment *Maumbwa & 3 Others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the Court stated as follows:

“By comparing the two applications and the authorities on *res judicata*, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is *res judicata*. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent Court. To my mind to bring the same issues between the same parties that have been determined by a Court of competent jurisdiction is an abuse of the Court process.”

23. The case questions other cases that had hitherto been decided by Courts of competent jurisdiction. The only way to challenge a decision of a Court is to review or Appeal but not through another suit. Like was said by the near President Al gore: -

“Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the Court's decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that ... Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done. And while there will be time enough to debate our continuing



differences, now is the time to recognize that that which unites us is greater than that which divides us. (Adjusted to UK English).”

24. Now in this application the Appellant/Applicant seeks to have a stay of the subordinate Court’s decision and this is the Applicant’s right. However I have examined attachment to the Replying Affidavit and noted that one of the prayers in the Notice of Motion Application dated 30/05/2023 at the Chief Magistrate’s Court at Kiambu included a prayer for stay of execution of the Judgment delivered on 26/05/2022.
25. This being the case it is for sure an outright abuse of the Court process for the Appellant/Applicant to want to relitigate what was already determined by a competent Court of law. Res judicata, clearly means that what the Appellant/Applicant is seeking from this Court is "a matter judged," and so the same parties are prevented from relitigating the same issue that has already been decided by a Court of competent jurisdiction.
26. So therefore any additional prayers based on the same facts and legal arguments are barred since they are dependant on the same application which is res judicata. In my understanding the res judicata principle is meant to lock out from the Court system a party who has had his day in a Court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the Appellant/Applicant’s application does satisfy the conditions for the principle of res judicata in view of the facts of this case and my response is that it does.
27. From the pleadings it is not in dispute that the subject matter in the previous Notice of Motion Application dated 30/05/2023 and the one in the current application is the same. Both the former Application and the present Application are between the same parties.
28. In the case of E.T.V vs. Attorney General & Another (2012) eKLR Majanja J stated that:

“The Courts must be vigilant to guard against 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 a new cause of action which has been resolved by a Court of competent jurisdiction.”
29. Applying the stated law to the facts before me, it is clear that the Appellant/Applicant seeks to open issues that were raised in the earlier proceedings as they were relevant to the issues that were decided. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this application the Appellant/Applicant is trying to litigate a concluded matter.
30. Given the foregoing in the end I do find and hold that the Appellant/Applicant’s Notice of Motion dated 21/1/2024 is unmerited and the same is dismissed and costs are awarded to the Respondent.

Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF JULY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:



Mr. Anyega for the Appellant/Applicant

Ms. Okomo for the 1st Respondent

2nd Respondent - Absent

Mr. Melita – Court Assistant

