



Kasyoki (Suing as the Administrator and the legal representative of the Estate of the Kasyoki Maliti – Deceased) v Kimuli; Tuli (Suing as the administrator and the legal representative of the Estate of the Mary Kimuli – Deceased) (Applicant) (Environment & Land Case 20 of 2018) [2024] KEELC 1406 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 20 OF 2018**

**TW MURIGI, J
MARCH 6, 2024**

BETWEEN

AGNES KALUKI KASYOKI (SUING AS THE ADMINISTRATOR AND THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE KASYOKI MALITI – DECEASED) PLAINTIFF

AND

MARY KIMULI DEFENDANT

AND

NDAMBUKI TULI (SUING AS THE ADMINISTRATOR AND THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE MARY KIMULI – DECEASED) APPLICANT

RULING

1. This ruling is in respect of the Preliminary Objection dated 12th July, 2023 raised by the Plaintiff/ Respondent on the following grounds: -
 - i. That this Court lacks requisite jurisdiction on the basis that there is an existing ruling of this Honourable Court dismissing the Notice of Motion application the Applicant herein seeks to amend and thus this application is *res judicata*.
 - ii. That the Applicant herein had filed a similar application which the court heard and delivered itself on the 26th day of April, 2023 dismissing the same application the Applicant herein intimates to have amended and as such this Honourable Court became functus officio upon delivering its ruling on 26th April, 2023.



- iii. That this amended application ought to be struck out as it is res judicata and hearing the same would be an embarrassment in the administration of justice where conflicting rulings are arrived at.
 - iv. That the instant application is incompetent, non-starter and an abuse of the process of the court. It is outright that the Applicant herein is hell-bent on wasting this Court's time and as such it should be struck out with costs.
2. The Preliminary objection was canvassed by way of written submissions.

The Plaintiff's Submissions

3. The Plaintiff's submissions were filed on 26th October, 2023. On her behalf, Counsel outlined the following issues for the Court's determination: -
- i. Whether the present application is res judicata?
 - ii. Whether the alleged amended Notice of Motion application dated 10th July, 2023 is proper before this Honourable Court?
4. On the first issue, Counsel submitted that the Applicant had filed a similar application dated 24/8/2022 which was heard and a ruling delivered on 26/4/2023 striking out the application with costs. Counsel contended that the prayers in the present application are similar to the prayers in the application dated 24/8/2022 save for prayer No. 1.
5. Counsel submitted that the elements of *res judicata* were enunciated by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR
- It was argued that instant preliminary objection conforms with the elements set out in *IEBC v Maina Kiai & 5 Others* (*supra*). Counsel further submitted that the doctrine of res judicata is founded on public policy and is aimed at achieving finality to litigation ensuring that an individual is not harassed twice on account of the same litigation.
6. On the second issue, Counsel submitted that that the application sought to be amended does not exist as the same was struck out. Counsel argued that the amended Notice of Motion is vexatious and a waste of judicial time since one cannot amend pleadings that are non-existent. Concluding his submissions, Counsel urged the court to uphold the preliminary objection with costs to the Plaintiff. To buttress his submissions, Counsel relied on the following authorities:-
- i) In re Estate of Claudio Opiyo Omwa (Deceased) [2017] eKLR.
 - ii) Nicholas Njeru v Attorney General & 8 others [2013] eKLR.

The Applicant's Submissions

7. The Applicant's submissions were filed on 30th October, 2023. On his behalf, Counsel submitted that the only issue for determination is whether the preliminary objection has met the legal threshold of a preliminary objection. Counsel submitted that Plaintiff's preliminary objection has not met the threshold set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Counsel further submitted that the preliminary objection is not based on a pure point of law and thus, it should be dismissed with costs.



8. In defining *res judicata*, Counsel referred the court to the definition in Black's Law Dictionary. Counsel submitted that a court should consider the following factors to determine whether a matter is *res judicata*: -
 - i. Whether the issues were really determined in the previous matter?
 - ii. Whether they are the same issues in the subsequent matter or they were covered by the decision?
 - iii. Whether the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction?
9. Counsel submitted that at paragraphs 40 and 41 of the ruling delivered on 26/4/2023, the court was categorical that, the Applicant ought to have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules since the application was filed after judgment was delivered. Counsel further submitted that the court held that the firm of Stanley Nthiwa & Co Advocates was improperly on record for the Applicant and that the said irregularity could be cured after the firm takes appropriate measures as stipulated in the rules.
10. Counsel further submitted that at paragraphs 43 and 44 of the ruling, the court held that it would not delve into the issues raised in the application and proceeded to strike out the application with costs to the Respondents.
11. Counsel contended that pursuant to the said direction of the court, the Applicant filed the amended Notice of motion dated 10/7/2023. Counsel further submitted that the present application is neither *res judicata* nor an abuse of the court process as the issues raised in the previous application were not determined with finality.
12. Counsel further submitted that the Applicant was at liberty to file a fresh application since the previous application had been struck out as opposed to being dismissed. Concluding his submissions, Counsel urged the court to dismiss the preliminary objection with costs. To buttress his submissions, counsel relied on the following authorities:
 1. [*Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*](#) [2017] eKLR.
 2. [*Enock Kirao Mubhanji v Hamid Abdalla Mbarak*](#) (2013) eKLR

Analysis and Determination

13. Having considered the preliminary objection in light of the pleadings and the rival submissions, the following issues fall for determination:-
 - i. Whether the amended Notice of Motion dated 10/07/2023 is *res judicata*.
 - ii. Whether the court is *functus officio*.
14. The Plaintiff contends that this court is barred from determining the Amended Notice of Motion dated 10/7/2023 as it is *res judicata*. The doctrine of *res judicata* is embedded in 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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

15. The doctrine of *res judicata* has been defined in the [Black’s Law Dictionary](#), 9th Edition at page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.

16. Both parties referred the court to the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR where the Court of Appeal set out the elements of *res judicata* as follows: -

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- 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.”

17. In the application dated 24/8/2022, the Applicant herein sought the following orders: -

- i. That this application be certified as urgent and heard *ex-parte* in the first instance.
- ii. That pending the hearing and determination of this application, this Court be pleased to issue an order staying the execution of the judgment issued on 15/12/2021 by this Court and all other consequential and or subsequent orders or decree.
- iii. That the Court be pleased to set aside all the proceedings, judgment dated 15/12/2021 and all other consequential and or subsequent orders and or decree.
- iv. That a declaration do issue that the suit herein abated on the 3/2/2020 thus the proceedings herein, the resultant judgment and decree are null and void and the file herein be closed forthwith.



- v. That costs of this application be awarded to the Applicant.
18. In the present amended application dated 10/7/2023, the Applicant has sought the following orders: -
- i. That leave do issue for the firm of Stanley Nthiwa & Company Advocates LLP to come on record for the Defendant.
 - ii. That pending the hearing and determination of this application, this Court be pleased to issue an order staying the execution of the judgment issued on 15/12/2021 by this Court and all other consequential and or subsequent orders or decree.
 - iii. That the Court be pleased to set aside all the proceedings, judgment dated 15/12/2021 and all other consequential and or subsequent orders and or decree.
 - iv. That a declaration do issue that the suit herein abated on the 3/2/2020 thus the proceedings herein, the resultant judgment and decree are null and void and the file herein be closed forthwith.
 - v. That costs of this application be awarded to the Applicant.
19. In its ruling delivered on 26/4/2023, this court struck out the application dated 24/08/2022 on account of want of compliance with the provisions of order 9 rule 9 of the [Civil Procedure Rules](#).
20. At paragraphs 42 and 43 of the ruling, this court held as follows: -
- “The irregularity can be cured after the firm takes the appropriate measures stipulated in the rules to come on record.
- Having found that the firm of Stanley Nthiwa and Co Advocates is improperly on record for the Applicant, I will not delve into the other issues raised in the application.”
21. From the foregoing, it is crystal clear that the issues raised in the application dated 24/8/2022 were not determined with finality. The irregularity of the Applicant’s law firm being on record led to the striking out of the application. On the basis of the above, I find that the Plaintiff has not demonstrated the requisite elements of *res judicata*.
22. As regards the second issue, the Plaintiff argued that the court became *functus officio* after it pronounced itself in the ruling delivered on 26/04/2023.
23. The doctrine of *functus officio* was stated by the Court of Appeal in the case of [Telkom Kenya Limited vs John Ochanda](#) (2014) e KLR as follows;
- “*functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
24. In the case of [Jersey Evening Post Limited v Al Thani](#) (2002) JLR, which was cited by the Supreme Court in the case of [Raila Odinga & 2 others vs Independent Electoral and Boundaries Commission & 3 others](#) 2013 eKLR the Court held as follows: -
- “...A court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are



finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”

25. Based on the above authorities which are binding on this court, it is clear that when a Court has already pronounced itself on a matter, it is deemed to have performed all its duties in the case and it becomes functus officio.
26. In the matter at hand, the Court has not pronounced itself on the other issues raised in the application dated 24/08/2022 where the Applicant is seeking for an order of stay of execution of the judgment delivered on 15/12/2021 and as such, this court is not functus officio.
27. The upshot of the foregoing is that the Plaintiff’s preliminary objection is devoid of merit and the same is hereby dismissed.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICRO SOFT TEAMS THIS 6TH DAY OF MARCH, 2024.

IN THE PRESENCE OF

Ms. Muthoki for the Applicant.

Muthiani for the Respondent.

Court Assistant Kwemboi.

