



**Muindi (Suing as an administrator in the Estate of Francis Alexander Kimangi Muindi)
v Mulwa (Sued as administrator of the Estate of Francis Mwanza Mulwa t/a FM Mulwa
Advocate) (Civil Suit 02 of 2023) [2024] KEHC 2346 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 02 OF 2023
FR OLEL, J
MARCH 6, 2024**

BETWEEN

**MARGARET NTHUKA MUINDI (SUING AS AN ADMINISTRATOR IN THE
ESTATE OF FRANCIS ALEXANDER KIMANGI MUINDI) PLAINTIFF**

AND

**GRACE MWANZA MULWA (SUED AS ADMINISTRATOR OF THE ESTATE OF
FRANCIS MWANZA MULWA T/A FM MULWA ADVOCATE) ... RESPONDENT**

RULING

1. The application before this court is the Notice of Motion application dated 13th April 2023 brought pursuant to provisions of Section 1A, 1B, & 3A of the Civil Procedure Act, Order 51 Rule 1 of the civil procedure rules, and all other enabling provision of law. The applicant sought orders that the plaintiff's originating summon application dated 14th February 2023 be struck out and be dismissed for being Res-judicata under the Civil procedure Act and for cost of the application and the main suit.
2. The application is supported by a supporting affidavit of Grace Mwanza Mulwa dated 13th April 2023. She deponed that this court has no jurisdiction to hear and determine the plaintiff's suit and/or make any orders in the originating summons as the same was Res judicata in line with section 7 of the Civil Procedure Act 2010 and that the suit was filed an afterthought. The plaintiff/respondent had filed a suit against the Defendant/Applicant being Milimani Civil Suit NO E4995 OF 2020, which was dismissed vide and order dated 28.01.2021.
3. The applicant had been forum shopping and had filed a similar matter being Machakos Chief Magistrate's Suit NO 24 OF 2023 which the respondent had withdrawn on 25.01.2023 after the applicant filed a preliminary objection challenging the lower courts jurisdiction to hear and determine the said suit. This suit was therefore an abuse of the process of the court, a non-starter, frivolous, vexatious and thus should be stuck out with costs to the Defendant/Applicant.



4. This application is opposed by the Respondent who filed her Replying Affidavit's dated 10th May, 2023. She maintained that the originating summons application dated 14th February 2023 was not res judicata in view of the Milimani Civil Suit No. E4995 Of 2020 since the former was not heard and determined on merits and the court had held that the subject matter and the parties were based in Machakos and the said suit should have be filed at Machakos law courts. A suit dismissed for want of geographical jurisdiction did not bar filing of a fresh suit in a court of competent jurisdiction. The applicant's originating summon was properly before this court since it has jurisdiction in respect to advocate -client relationships under the Advocate's Act and Order 37 of the *Civil Procedure Rules*.
5. She had then filed a similar Application before the lower court being Machakos CMCC NO 24 OF 2023, but had withdrawn the said suit before it was set down for hearing hence the same was of no consequence in relation to the current suit. Section 7 of the Civil Procedure rules, only applied where the suit or issue in which the matter directly and substantially in issue has been directly and substantially in the former suit between the same parties and a determination made thereon. Thus the doctrine of res judicata was only applicable when dealing with similar issue already dealt with finality in a court of competent jurisdiction.
6. The respondent further relied on the "Black's law Dictionary" where it was stated that settled judicial decisions had pointed out three essential ingredients of res judicata, namely; an earlier decision on the issue, a final judgement on the merits and involvement of the same parties, or parties in privity with the original parties. That was not the obtaining circumstance herein and therefore she urged this court to dismiss the respondent's application with costs as it lacks merit.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and submissions filed by both parties. The only issue which arise for determination is whether the originating summons dated 14th February 2023 is res judicata in view of Milimani Suit no E4995 of 2020.
8. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

"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"
9. The *Black's law Dictionary 10th Edition* defines "res judicata" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
10. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;
 - i. What issues were really determined in the previous Application;



- ii. Whether they are the same in the subsequent Application and were covered by the Decision.
 - iii. Title and that the previous Application was determined by a court of competent jurisdiction. Whether the parties are the same or are litigating under the same.
11. This was enunciated by Kuloba J., in the case of *Njangu vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), held that:
- ‘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.....’
12. The doctrine of Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
13. The the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), that:
- For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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.
14. The Court went on to state on the role of the doctrine:
- 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 fora, 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.



15. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR the court also comprehensively dealt with the different facets making up the doctrine of res judicata. The Court stated as follows:

(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. 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; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action

15. In this case, the Applicant contended that the doctrine of res judicata applied because it was not dispute that both the former suit Milimani Civil Suit No E4995 of 2020 between Margaret Nthuka Muindi (suing as an administrator in the *estate of Francis Alexander Kimangi Muindi*) vs *Francis Mwanza Mulwa* and the latter have the same parties in common, that the subject matter in the two matters was one and the same revolving around the recovery of monies.

16. The Plaintiff/Respondent on the other hand states that the originating summons dated 14th February 2023 was not res judicata in view of the Milimani Civil Suit No E 4995 of 2020 since the said suit was not heard and determined on merit because the court found that the subject matter and the parties were situated in Machakos hence the same should be filed within Machakos county. A suit which has been dismissed for want of jurisdiction is not a bar to filing of a fresh suit in a court which has competent jurisdiction.

17. Guided by the above authorities, I find that the that the originating summons application dated 14th February 2023 is not Res judicata because it is an undisputable fact that the former matter Milimani Civil Suit NO E 4995 OF 2020 was simply dismissed for want of jurisdiction, While the subsequent suit Macahkos CMCC NO 24 of 2023 was withdrawn, before it was set down for hearing. Though they concern the same parties and similar issues are raised. None of the matters was determined on merit.

Disposition

18. The finding of this court is that the Originating Summons dated 14th February 2023 is therefore not res judicata. The Defendant/Applicant's application dated 13th April 2023 is dismissed with costs to the Plaintiff/Respondent.

19. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 6TH DAY OF MARCH, 2024

In the presence of: -



No appearance for Plaintiff
No appearance for Defendant
Sam Court Assistant

