



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**ELC MISCELLANEOUS CASE NO. 8 OF 2021**

**STEPHEN MUGAO NKUNGU.....APPLICANT**

**VERSUS**

**JULIA WANJA MUCHEGE.....RESPONDENT**

**RULING**

1. This ruling is in respect of the applicant's application dated **3<sup>rd</sup> September 2021** in which the applicant seeks orders that:

- i. That this Application be certified as urgent requiring to be placed before the Honourable Judge soonest.
- ii. That this application be heard during the High Court's vacation.
- iii. That service of this application be dispensed with in the first instance.
- iv. That the Applicant be released from civil jail on judicious terms or on personal bond pending the hearing and determination of this application.
- v. That costs of this application be provided for.

2. The applicant was committed to civil jail for a period of 6 months for allegedly disobeying court orders that were issued on 20<sup>th</sup> April 2021 by Hon. P. N. Maina (C.M.) in the Chief Magistrate's Court at Marimanti, Environment and Land Case No. E008 of 2021 in relation to land parcel Tharaka/Rukurini/1529.

3. The applicant tried to set aside, discharge and review the orders and other consequential orders but the application was dismissed with costs for lack of merit.

4. The applicant states that he was not given a chance to purge contempt by adducing his evidence before the said Honourable court.

**LEGAL ANALYSIS AND DETERMINATION**

5. The foregoing elements apply in equal measure to this application.

6. I frame the issues for determination in respect of the application dated 03.09.2021 as follows:

**i. Whether the application is Res Judicata.**

**ii. Whether the application is merited.**

**Whether the application is Res Judicata**

7. The test for determining the application of the doctrine of *res-judicata*

"(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."

8. In the cases of **Henderson vs Henderson (1843) 67 ER 313** res-judicata was described 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 litigations 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 pleas 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".

9. Similarly, 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".

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.....".

10. The doctrine of res judicata applies to applications as in suits.

11. The application before the court is not for the setting aside or for review of the orders. Similarly, the application is not an appeal over the ruling in Marimanti E & L Case No. E008 of 2021. The application before this court is similar to the one made before the subordinate court and which application was determined by that court.

12. The applicant seeks to be released from civil jail on judicious terms or on personal bond.

13. My understanding of the application is that the applicant had approached the subordinate court through an application to set aside or, discharge the orders that had been issued on the 20<sup>th</sup> April ,2021.

14. The applicant has attached and marked SMN4 copy of the application dated 27<sup>TH</sup> July,2021.

15. That the application to set aside the order committing him to jail was dismissed by the trial court for lack of merits.

16. The applicant has again come to court with a similar application.

17. In particular, the case of **Herderson vs Herderson (1843) 67 ER 313** is applicable herein where it was stated that "**Where a given matter becomes 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...**".

18. Expounding further on the essence of the doctrine the Court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

19. The court went further to reason that the essence of the principles of res-judicata is to not only to protect the courts from disrepute, but

also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel.

20. In light of the constitutional imperative under Article 159 of the constitution on expedition in the resolution of disputes, there must be expeditious disposal of the suit.

21. The subordinate court vide a ruling dated 8.7.2021 did indicate to put to rest this matter before all the parties. It therefore points out that the same matter was dealt with effectively by a court of competent jurisdiction and the same brought to a finality.

**In light of the above, does the current court have jurisdiction over this matter?**

22. Jurisdiction goes into the heart and soul of any proceeding. In this regard, the question of jurisdiction should not only be raised at the earliest opportunity, but it must be the first issue to be resolved from the outset.

23. In **Republic v Karisa Chengo & 2 others [2017] Eklr**, the Supreme Court of Kenya held: -

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

24. In the celebrated Court of Appeal decision in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] Eklr**, Nyarangi JA famously held: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”.

25. This court has noted that a similar application was made by the applicant before the subordinate court and that court made a determination on it. The applicant has now filed a similar application before this court. The court is not being asked to exercise its appellate jurisdiction. The application has only been brought by way of a miscellaneous application. Indeed, it is admitted that there is an appeal filed and which is still pending.

**CONCLUSION**

26. Accordingly, the court finds that the elements set herein above which give rise to the application, the doctrine of *res-judicata* could be discerned from the application.

27. The applicant should have approached court through an appeal as already done, not an application, such as this.

28. I find that this application is *res judicata* and an abuse of the court process.

29. The applicant’s application is dismissed with costs.

**DATED SIGNED AND DELIVERED AT CHUKA THIS 13<sup>TH</sup> DAY OF OCTOBER, 2021 IN THE PRESENCE OF:**

**C/A: Ndegwa**

**Mwendwa for Respondent**

**N/A Ms. Kijaru for Applicant**

**C. K. YANO,**

**JUDGE.**