



Peter v Chief Conservator of Forests & 2 others (Environment and Land Judicial Review Case E015 of 2024) [2025] KEELC 6788 (KLR) (6 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E015 OF 2024**

BM EBOSO, J

OCTOBER 6, 2025

BETWEEN

HOSEA MUTEMBEI PETER EX PARTE APPLICANT

AND

CHIEF CONSERVATOR OF FORESTS 1ST RESPONDENT

KENYA FOREST SERVICE 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Vide a chamber summons dated 19/12/2024, the ex parte applicant, Hosea Mutembei Peter, moved this court seeking leave to initiate judicial review proceedings to obtain: (i) an order of certiorari quashing the 1st respondent's status report dated 21/6/2024; (ii) an order of prohibition barring the implementation or enforcement of the report or his eviction from his quarry while relying on the status report dated 21/6/2024 which recommended the suspension of his Special User Licence [hereinafter referred to as "the SUL"] dated 22/8/2019. The ex-parte applicant further prayed that the leave do operate as a stay of implementation of the report or his eviction from the forest. On 20/12/2025, this court [Yano J] granted the ex-parte applicant leave as sought. In addition, the court [Yano J] directed that the leave granted was to operate as a stay of implementation of "the impugned decision". The court directed the ex-parte applicant to file the substantive motion within 21 days.
2. The ex-parte applicant subsequently filed a substantive motion dated 20/12/2024, seeking the above two judicial review orders. The judicial review motion attracted an objection through a formal application dated 13/3/2025 by the three respondents, seeking orders striking out the suit on the ground that the suit was res judicata. The respondents' application dated 13/3/2025 is the subject of this ruling.



3. The application was premised on the grounds outlined in the motion and in the supporting affidavit sworn on 13/3/2025 by Wellington Ndaka. It was canvassed through written submissions dated 4/6/2025, filed by Mr. Njeru Mugambi, a Litigation Counsel in the Office of the Attorney General. The crux of the applicants' case is that the dominant issue in the judicial review motion was heard and determined by this court [Nzili J] in Meru ELC Petition No. E005 of 2024; Amos Thurania -v- Kenya Forest Service and Others. The applicants contend that the dominant issue in the said petition was the validity of a special user licence for quarrying, issued to the ex-parte applicant by the Kenya Forest Service. They state that the SUL was cancelled by this court vide a judgment rendered in the said petition on 4/12/2024. They add that the ex parte applicant was dissatisfied by the judgment, adding that the ex-parte applicant lodged an appeal in the Court of Appeal, challenging the said judgment.
4. The applicants contend that this suit is res judicata because the key issue in the suit is the same as the key issue that was the subject of determination in Meru ELC Petition No. E005 of 2024. They emphasize that the key issue in the petition was the validity of the SUL. They add that the ex-parte applicant was an interested party in Meru ELC Petition No. E005 of 2024 and fully participated in the said petition.
5. In their submissions, the applicants cite various decisions by the Court of Appeal on the subject of res judicata, among them, The Independent Electoral and Boundaries Commission -v- Maina Kiai & 5 Others [2017] eKLR. They urge the court to strike out the suit.
6. The ex-parte applicant opposed the application through his replying affidavit dated 13/5/2025 and written submissions dated 26/6/2025, filed by M/s Mwirigi Kaburu & Co Advocates. The gist of the ex-parte applicant's case is that: (i) the parties in this judicial review application are not the same as the parties in Meru ELC Petition No E005/2024; (ii) the key issues in this judicial review application are not the same as the key issues that fell for determination in Meru ELC Petition No. E005/2024; and (iii) the key issue in the present judicial review application was not determined in the preceding petition.
7. The ex-parte applicant argues that the petitioner in ELC Petition No. E005/2024 was Amos Thurania M'Rinjiru while the respondents were: (i) National Land Commission; (ii) Kenya Forest Service; (iii) The Ministry of Environment and Forestry; and (iv) The Attorney General. Counsel for the ex-parte applicant contends that Hosea Mutembei Peter (the ex-parte applicant) was only joined as an interested party in the petition and he did not lodge any cross-petition. The petitioner contends that the parties in the two cases are different.
8. Counsel further argues that Petition No. E005/2024 was about the constitutionality of the licensing of the quarry activities in a gazetted forest while the judicial review case is about the decision-making process of the Chief Conservator of Forests and the Kenya Forest Service, with regard to the status report dated 21/6/2024.
9. Lastly, the ex-parte applicant argues that the judgment in Petition No. E005/2024 did not determine the issue relating to the decision-making process of the 1st and 2nd respondents in relation to the status report dated 21/6/2024, pointing out that the court only noted in its judgment that the interested party had not challenged the status report dated 21/6/2024. Counsel for the ex-parte applicant submits that the report dated 21/6/2024 is open to challenge through judicial review proceedings.
10. Citing the key elements of res judicata as outlined by the Supreme Court of Kenya in John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others 92021) KESC 30 (KLR), counsel for the ex-parte applicant urges the court to reject and dismiss the application dated 13/3/2025.



11. The court has considered the application, the response to the application, and the parties' respective submissions on the application. The single issue falling for determination in this ruling is whether this judicial review case is res judicata.
12. The common law doctrine of res judicata has been enacted as part of Kenya's statute law under 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.”
13. Kenya's Parliament legislated explanatory notes defining the doctrine in details. It emerges from the substantive framework and from the explanatory notes that a party alleging res judicata must demonstrate the following essential elements: (i) previous existence of a suit relating to the same cause of action in a court of competent jurisdiction; (ii) previous determination of the same cause of action or the same issue by a court of competent jurisdiction; and (iii) privity to the previous suit by the parties or legally recognized representatives of the parties in the offending suit.
14. Commenting on the application of the doctrine of res judicata in civil proceedings in Kenya, the Supreme Court of Kenya outlined the following as the essential elements of res judicata in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC KLR:

“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. (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.”
15. The Court of Appeal in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR stated that the elements of res judicata are conjunctive rather than disjunctive. The Court of Appeal emphasized that for a suit to be deemed as res judicata on account of a former suit, the following five elements must be established: (i) the suit or issue was directly or substantially in issue in the former suit; (ii) that former suit was between the same parties or parties under whom they or any of them claim; (iii) those parties were litigating under the same title; (iv) the issue was heard and finally determined in the former suit; and (v) the court that formerly heard and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.
16. The court in *Henderson v Henderson* (1843) 67 ER 313 emphasized that the doctrine of res judicata applies not only to issues on which the court was actually required by parties to make pronouncements, but also to every issue which properly belonged to the subject of litigation (cause of action) in the



previous suit and which the parties, exercising reasonable diligence, might have canvassed in the preceding suit. The court stated thus:

“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 in 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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.”

17. The Supreme Court of Kenya outlined the policy rationale of the doctrine of *res judicata* in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others* [supra] as follows:

“We affirm our position as in the *Muiri Coffee* case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* 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”.

18. On its part, the Court of Appeal outlined the rationale of the doctrine of *res judicata* in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR as follows:

“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 common-sensical 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 for a, 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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

19. Is this judicial review case *res judicata*? Put differently, have the respondents in the substantive motion [the applicants in the objection application dated 13/3/2025] demonstrated the essential elements of *res judicata*? I will start with the parties to the two suits. Hosea Mutembei Peter is the ex-parte applicant. He was joined as an interested party in the preceding petition (*Meru ELC Petition No. E005/2024*). He opposed the petition through two affidavits dated 24/6/2023 and 1/8/2024 respectively and written submissions dated 30/8/2024. He had the opportunity to present or apply to present a cross-petition but he elected not to do so. He fully participated in the procurement of the judgment that was rendered in the said petition.

20. The Chief Conservator of Forests was not a party to the petition but the Kenya Forest Service was the 2nd respondent in the petition. The Chief Conservator of Forests is an officer within the Kenya Forest



Service. The decision that was impugned in the petition [grant of the special user licence to the ex-parte applicant] was made by the Kenya Forest Service. The Attorney General was the 4th respondent in the petition. From the foregoing, it is clear that key parties to this judicial review case were parties to the preceding petition and fully participated in the procurement of the judgment that was rendered by this court in the said petition. Indeed, aggrieved by the judgment, the ex-parte applicant lodged an appeal in the Court of Appeal by filing and serving a notice of appeal.

21. Does this cause raise an issue or issues similar to what was raised and determined in the preceding petition? This judicial review cause challenges the report that led to the cancellation of the interested party's special user licence. The report is dated 21/6/2024. The ex-parte applicant contends that he was not heard prior to the compiling of the report, adding that he was condemned unheard. It is his case that the report consisted of malafides and was arbitrary, unfair and unprocedural. He wants the report quashed and the respondents prohibited against implementing or enforcing the report or evicting him from the forest.
22. On the other hand, the reliefs sought in the preceding petition were as follows: (i) a declaration that the actions of the respondents through their officers, agents or servants were unlawful, unconstitutional, arbitrary, and illegal in allowing, licensing, or authorizing the establishment and operation of a quarry within Imenti Forest, Meru County, where the excavation is being or about to be undertaken in a water catchment area; (ii) a declaration that the excavation of stones for quarrying business and damage of the forest and a water catchment area was environmental damage and amounted to pollution and thus unconstitutional; (iii) prohibition orders to restrain the respondents, their officers and any government agency from allowing, licensing, or authorizing the establishment and operation of a quarry within Imenti Forest, which is an environment danger and source of pollution; and (iv) an order canceling any licenses or authorization of any kind to establish a quarry business within Imenti Forest Meru County.
23. Upon hearing the parties, this court issued the following reliefs in Petition No. E005/2024:
 - a. A declaration is hereby issued that the actions or decisions of the 2nd and 3rd respondents through their officers, agents or servants in allowing, licensing or authorizing the establishment and operation of a quarry and an asphalt concrete maker within Imenti North Forest, County of Meru, where excavation has been going on was and is arbitrarily unreasonable, unprocedural and contrary to the sectoral laws on forests and climate change and was in breach of the petitioner's constitutional right to clean and healthy environment, as set out in Article 42 and 70 of *the Constitution*.
 - b. A declaration is hereby issued that the excavation of stones and the quarrying licensing running and the operating of an asphalt concrete maker within Imenti North Forest, County of Meru, by the 2nd and 3rd respondents was and amounted to the undertaking of activities likely to cause environmental, under the *Climate Change Act, Forest Conservation and Management Act, Environment Management & Coordination Act* and *the Constitution* of Kenya.
 - c. An order of prohibition is hereby issued prohibiting the respondents, their officers and any other government agent from allowing, licensing or authorizing the establishment of and operation of a quarrying activity and an asphalt concrete maker within Imenti North Forest County of Meru, which are inconsistent with and in breach of the petitioner's right to clean and healthy environment as to amount to environmental damage or pollution.



- d. An order be and is hereby issued canceling, suspending or authorizing any issuance of licenses, permits of any kind by the 2nd and 3rd respondents to establish or run quarrying or asphalt concrete maker business within Imenti forest, otherwise than in compliance with the petitioner's right to clean and healthy environment as set out under the *Forest Conservation and Management Act*, the Environmental Management and Coordination Act, *Climate Change Act* and Constitution of Kenya.
24. . It is clear from the above verbatim reliefs that the question whether or not to cancel the ex parte applicant's SUL arose for determination. It does also emerge from paragraph 15 of the exhibited judgement that one of the key pieces of evidence which the respondents presented was the impugned status report. It was exhibited as WN3. Indeed, it emerges from paragraph 49 of the judgment of this court in the preceding petition that the ex parte applicant had the opportunity to interrogate the status report dated 21/6/2024. He, indeed, interrogated the report by making comments on it. The court relied on the status report in reaching its decision [See paragraph 98 of the judgment].
25. . In his submissions on the application under consideration, the ex parte applicant admits that in Petition No. E005/2024, the court noted that the ex parte applicant had not challenged the status report dated 21/6/2024. The report was a key piece of evidence in the constitutional petition. It informed the findings which this court made in the preceding judgment. Based on the report, the court granted an order canceling the ex parte applicant's special user license. The ex parte applicant subsequently filed a notice of appeal and has now come to this court to obtain an order quashing the report.
26. . Clearly, the question as to the procedure of procuring the status report was one of the issues that the ex parte applicant had an opportunity to canvas before this court in the petition. If he failed to challenge the report during disposal of the petition, he cannot revisit the issue post-judgment after the court has relied on the report to reach a final judgment. Trying to challenge the report through a new cause, in my view, is res judicata [See (i) Henderson v Henderson (Supra) and (ii) Benjoh Amalgamated Limited (Supra)]. The finding of the court is that the validity of the status report dated 21/6/2024 was a question that fell for canvassing and determination in the preceding petition and the petitioner having had the opportunity to challenge the report, he cannot bring a fresh cause to challenge it. It is res judicata to raise the question through a judicial review motion at this point.
27. . The competence of this court to hear and determine the preceding petition has not been questioned. The preceding judgment was a merit decision of this court.
28. . In light of the above findings, the court comes to the finding that the applicants in the notice of motion dated 13/3/2025 have demonstrated that this suit is res judicata. On costs, the general principle in Section 27 of the *Civil Procedure Act* is that costs follow the event. There are no proper reasons to warrant a departure from the general principle.
29. In the end, the respondents' application dated 13/3/2025 is allowed in the following terms:
- a. This judicial review case is struck out for being res judicata.
- b. The ex parte applicant shall bear costs of the case.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 6TH DAY OF OCTOBER, 2025.

B M EBOSO [MR]



ELC JUDGE

<i>ruling – elc l jr no. e015 of 2024</i>	0
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