



**Muthoka v Mutua & another (Civil Appeal E957 of 2024)
[2025] KEHC 16167 (KLR) (Civ) (10 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E957 OF 2024

LP KASSAN, J

NOVEMBER 10, 2025

BETWEEN

SIMON MBAI MUTHOKA APPELLANT

AND

FRANCISCA NDINDA MUTUA 1ST RESPONDENT

CHARLES MUTUKU MUSYIMI 2ND RESPONDENT

JUDGMENT

1. This is an Appeal against the decision of the Lower Court dated the 23rd day of July 2024 in which the Learned Magistrate dismissed the Lower Court Suit for being res judicata. The brief history of this matter is that there were two Suits which were filed involving the same parties- one filed at Mavoko law Courts on the 2nd day of August 2021 for material damages and the other filed on the 21st day of October 2021 for personal injuries. These two suits had everything similar save for prayers whereby one is for compensation for personal injuries and the other for material damages. The suit in Mavoko Law Courts was concluded during the pendency of the Milimani Suit prompting an application for res judicata in the lower Court which is now the subject of this appeal. I have read submissions, the Ruling and all relevant authority and to dispose this Appeal I shall note the following;

Periods of filing the two suits;

2. These two suits in different Courts were filed around two months apart. This is crucial in interrogating whether a matter is res judicata or not and needless to say, when both matters were still pending in respective Courts, there was no issue of re judicata or subjudice. The Respondent appeared to have waited for the Mavoko Suit to be issued so as to raise the issue of res judicata or so it seems. Some folks may see this as manifestation of bad faith and this could be compared to a case whereby a litigant who has a preliminary objection in a pending suit but chooses not to file the PO but instead wait for the



matter to be heard to its conclusion and raise it during submissions or before judgement. When these two matters were pending, their ought to have been an application in good faith to save Judicial time by amending one suit to carry on board the same claim and withdrawing the other. The principles of estoppel could be invoked under these circumstances because the Respondent appeared comfortable during the simultaneous pendency of the two suits creating a false impression that the two matters could proceed to conclusion only to turn around and turn the tables. Essentially, this was supposed to have been done by the Appellant but he failed to do so and such mistake by his advocates should not be visited upon an innocent litigant because that would be a travesty of Justice. On the other hand, the Court would frown on an advocate or a litigant who goes silent on a technicality during the pendency of similar suits only to emerge with sharp claws at the right time. In Kenya, litigation is largely adversarial but Courts must temper it with Justice where necessarily without compromising on the mode of litigation.

The Claims

3. The Claims in both Courts Appear different - one for Material damage and the other for Personal injuries. The mode of proving these claims are unique in each claim for example for personal injuries, medical reports are involved as the damage is on a human body but for material damage it is for a car. Should the Courts hold that these distinct claims must be in one suit and failure to do so should lead to dismissal? One of the purposes in principles of res judicata is to save Court's time. Parties are required to ventilate all their claims in one suit and not to litigate in installments. I do not have the privilege of knowing the pecuniary jurisdiction of Mavoko Court that handled the matter and whether it could have measured compensations for both the material damage and personal injury and if this would have been the case, what would happen now that the Court is functus officio? The jurisprudence of res judica is wide and far. I believe that specific remedies in cases with all similar ingredients is key in determining res judicata. For example, where in a claim for personal injuries, a litigant fails to include special damages and the matter is heard and concluded, he cannot file another claim for specials. The Mavoko matter being a case for material damage could not determine personal injuries. The sequence of the claim in Mavoko Court was only for material damage.

The rights of litigants to file Suits

4. It has been the tradition of Courts to give unlimited rights to litigants to decide how to file their suits so long as there is Jurisdiction. The Courts have obligation to guard against multiplicity of suits with more less the same claims. In this Appeal before me, there are only two suits and this cannot meet the threshold of "multiple suits".

Mavoko Case:

5. The concluded suit in Mavoko did not deal with personal injuries. How then shall the Appellant be compensated for this claim? The Courts have held in many instances that Justice is the ultimate goal of any litigation regardless of technicalities or procedural flaws. If this Court was to hold that the matter is res judicata, a grave injustice shall fall upon the Appellant. To the contrary, there would be no prejudice on the part of the Respondent unless it is as a results of Justice from the Courts decision in Milimani which really should not be regarded as a prejudice.

Conclusion

The lower Court decision is reversed. The matter is referred back to the lower Court for hearing and determination of the matter by a magistrate other than the trial Court.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 10TH DAY OF NOVEMBER 2025



HON L. P. KASSAN

JUDGE

In the presence

Ms Maina for Appellant

Ms Onyango for Respondent

Carol – Court Assistant

