



Karanja v Kangethe t/a Impress Communications Printers & Stationery (Miscellaneous Application E148 of 2025) [2026] KEELRC 221 (KLR) (23 January 2026) (Ruling)

Neutral citation: [2026] KEELRC 221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E148 OF 2025**

**JW KELI, J
JANUARY 23, 2026**

BETWEEN

HENRY KARANJA APPELLANT

AND

**DAVID KANGETHE T/A IMPRESS COMMUNICATIONS PRINTERS &
STATIONERY RESPONDENT**

RULING

1. The applicant filed application dated 29th May 2025 seeking for the following order—
 - a. That this Honourable court be pleased to grant the Applicant leave to appeal out of time against the judgment delivered by Hon. B.M.Cheloti on 7th November 2023.
 - b. That the costs of this application be provided for.
2. Grounds of the application -
 - a) Judgment in the trial court in Milimani ELRC Cause No. 1694 of 2018 was initially scheduled to be delivered on 27th October 2023 however, on the said date, the trial court was indisposed and the judgment was not delivered;
 - b) The matter was subsequently rescheduled to 7th November 2023 whereof the same was not delivered and a subsequent date of 31st January 2024 was issued, when judgment was eventually delivered;
 - c) Dissatisfied with the judgement of the trial court, the Applicant filed his Memorandum of Appeal in High Court at Milimani Civil Appeal No. E034 OF 2024, Henry Karanja -vs- David Kangethe T/A Impress Communications Printers & Stationery on 20th February 2024. In doing so, he relied on 31st January 2024 as the date of delivery of judgement in calculating the



time for appeal, and therefore the Appeal was filed within the 30-day appeal period provided under Section 79G of the *Civil Procedure Act*;

- d) Subsequently, the Respondent raised a Preliminary Objection dated 10th January 2025 claiming that the appeal was filed out of time, citing the 7th November 2023 date as the judgment date whereof the same was erroneously retained on the physical copy of the Judgment and subsequent decree;
 - e) On 23rd May 2025 in Milimani Civil Appeal No. E034 OF 2024, Hon. Lady Justice Kelly Jemimah issued a Ruling essentially dismissing the Appeal for being filed out of time therefore necessitating this Application.
 - f) From the foregoing, the delay in filing of the appeal was not due to any fault and/or negligence on the part of the Applicant but due to the uncertainty of the judgement date.
 - g) The Applicant has a good and arguable appeal with high chances of success, and unless leave is granted, they shall suffer irreparable loss and prejudice;
 - h) The delay in filing the appeal, is neither inordinate nor deliberate but was occasioned by circumstances beyond the Applicant's control;
 - i) That it is in the interests of justice and fairness that this Honourable Court exercises its discretion in favour of the Applicant.
3. The application was supported by affidavit sworn by the applicant on the 29th May 2025 where he annexed extracts of the CTS record, a copy of the memorandum of appeal.
 4. In response to the application the respondent filed a Notice of Preliminary Objection dated 26th August 2025 in the suit herein on the following grounds: -
 - a) That the Application dated 29th May 2025 is Res-judicata and an abuse of the Court process contrary to Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya which prohibits “recycling” of matters.
 - b) That a similar Application involving the same parties over the same subject matter by the same Applicant was heard and decided on merits in (Milimani Civil Appeal No. E034 of 2024 Henry Karanja -vs- David Kangethe T/A Impress Communications Printers & Stationery) where similar reliefs were sought and declined by the Court in a ruling issued by Hon. Lady Justice Keli Jemimah on 23rd May 2025.
 5. The Deputy Registrar of the court directed that the Notice of Preliminary Objection be canvassed by way of written submissions.

The Respondent's/Objector's Submissions

6. Whether the present suit is Res judicata contrary to Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya which prohibits “recycling” of matters. It is trite law that any preliminary objection should be filtered, weighed and balanced on the measurements of the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) 1 EA 696 where Law J. stated as follows: “.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.....” We place reliance on the above case to fortify the position that our Preliminary Objection does not deal with disputed facts in the suit. The issue of Res judicata is a point of law, which can dispose of a suit. For this reason, we are convinced that our preliminary objection meets the criteria of what is



described in the *Mukisa Biscuits* case and is merited. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act*, 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.” The Act has further expounded on the principle setting out under explanations 1-6 thus: “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 (2) — For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation (3) — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. 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 (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. 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.” We invite this court to be guided by the decision in the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the Supreme Court delved into an in-depth discussion of the concept of *res judicata*. The court held that for *res judicata* to be invoked in a civil matter the following elements had to be demonstrated: a. there was 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 had to be between the first and the second action identical parties, subject matter and cause of action. It is our submission that a similar Application involving the same parties over the same subject matter by the same Applicant was heard and decided on merit in (Milimani Civil Appeal No. E034 of 2024 *Henry Karanja - vs- David Kangethe T/A Impress Communications Printers & Stationery*) where similar reliefs were sought and declined by the Court in a ruling issued by Hon. Lady Justice Keli Jemimah on 23rd May 2025. From the face of it, this instant suit meets all the elements that were set for *Res judicata* to be invoked in a Civil matter. This suit and Milimani Civil Appeal No. E034 of 2024 *Henry Karanja -vs- David Kangethe T/A Impress Communications Printers & Stationery* have identical parties, a similar subject matter and the same cause of action. Additionally, there was a former order issued by Hon. Lady Justice Keli Jemimah on 23rd May 2025 which was final, the order was on merit and was rendered by a court having jurisdiction over the subject matter and the parties. The Applicant cannot therefore seek, through a Miscellaneous Application, to revisit or overturn that Ruling. The Applicant’s present Application is a clear attempt to circumvent the outcome of the earlier Ruling. The appropriate recourse would have been to appeal against the decision of Hon. Lady Justice Keli Jemimah, not to file a new Miscellaneous Application before a court of concurrent jurisdiction. We urge this court to be guided by the decision in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) where it was held as follows regarding the doctrine of *res judicata*: “*Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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. It emerges that, contrary to the Respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the *Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293): The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgement becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

7. We invite this court to examine the entire pleadings and record of the previous case; (Milimani Civil Appeal No. E034 of 2024 Henry Karanja -vs- David Kangethe T/A Impress Communications Printers & Stationery) and the instant case to ascertain that the issues determined in the previous case are the same, confirm that the parties are the same and are litigating under the same title and that the previous case was determined by a court of competent jurisdiction and a decision was issued by Hon. Lady Justice Keli Jemimah on 23rd May 2025 that settled the issues in question. The filing of this Application constitutes an abuse of the court process. Courts have repeatedly held that it is improper for a party to seek the same reliefs already denied in a previous suit through a different procedure or forum. By invoking a Miscellaneous Application, the Applicant is seeking to hoodwink this Honourable Court into exercising jurisdiction already exhausted in Milimani Civil Appeal No. E034 of 2024. This Honourable Court lacks jurisdiction to sit on appeal or review the decision of a Judge of concurrent jurisdiction. The only lawful avenue was an appeal to the Court of Appeal. The Applicant himself admits that judgment was delivered on 7th November 2023, and that a Memorandum of Appeal was filed on 20th February 2024— well outside the thirty (30) days prescribed under Section 79G of the *Civil Procedure Act*. The Applicant never sought leave to file the appeal out of time prior to filing it, nor did he move the Court promptly thereafter. The excuse that delay was caused by the late availability of typed proceedings is untenable, since a Memorandum of Appeal can be filed based on the judgment alone, as the Court correctly observed in its previous ruling. Shockingly, in the current Application, the Applicant now alleges that the judgment was delivered on 31st January 2024, contradicting his earlier pleadings, filings, and the very record relied upon in Civil Appeal No. E034 of 2024. This sudden introduction of a new “judgment date” is not only absurd but also raises serious concerns about the integrity of the Applicant’s pleadings. It begs the question — what has changed between the earlier appeal and the current application? The Applicant cannot approbate and reprobate — he cannot rely on 7th November 2023 in one proceeding and 31st January 2024 in another, depending on which date suits his argument. This inconsistency exposes the bad faith underpinning this Application. In *Abubakar Zain Ahmed v National Bank of Kenya Ltd* [2006] eKLR, the court held that parties are bound by their pleadings and cannot introduce new evidence that contradicts their previous sworn positions. The Applicant is attempting to distort facts already on record in order to manufacture grounds for a fresh appeal. Such conduct must not be entertained. We further submit that a Miscellaneous Application is not a proper legal vehicle for seeking substantive reliefs that touch on concluded proceedings. It does not constitute a suit and cannot confer jurisdiction where none exists. The Court of Appeal emphasized that jurisdiction flows from the law and not from the craft of parties. In the case of *E.T. v Attorney General & another* [2012] KEHC 5506 (KLR) the court considered the implication of adding an additional cause of action or parties in an endeavour to



defeat/escape the doctrine of res judicata. The court stated thus: The courts must always be vigilant to guard against 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 a form a new cause of action which has been resolved by a court of competent jurisdiction.

Applicant's Submissions

8. As to what constitutes a Preliminary Objection, the court in *Zipporah Njoki Kangara v Rock And Pure Limited & 3 Others* [2021] eKLR the court stated that, "the above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:- "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop" I have further relied on the decision of *Attorney General & Another - versus - Andrew Mwaura Githinji & Another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct. (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute." The Respondent contends in his Preliminary Objection that the Applicant's Notice of Motion dated 29th May 2025 is Res-Judicata on grounds that similar issues were handled by the court in Employment and Labour Relations Court at Nairobi, Civil Appeal No. E 034 OF 2024. On the other hand, the Applicant contends that the issues before the court in the appeal matter are distinct and separate to those raised in the motion dated 29th May 2025 before this court. Consequently, we submit that the Preliminary Objection before this court invites the court to investigate and look at the facts in contest before it, in order to make its determination and further, it calls for the said facts before the court to be investigated. We humbly submit that Preliminary Objection is void due to raising questions of facts rather than pure points of law. On this score rely on the pronouncement of the court in *Mwachenga v Omondi & 3 Others (environmental And Land Originating Summons 005 of 2023)* [2025] eKLR where the court held that: "The Defendant has contended that the suit is Res Judicata, whereas the Plaintiffs/Respondents have disputed the said facts and stated that the issues raised in the former suits were different from what is before this court for determination. For the Court to be able to ascertain whether or not the matter is Res Judicata, it will have to ascertain the facts as pleaded by the Defendant/Applicant and those as raised by the Plaintiffs/Respondent by also probing the judgements. In doing so, the Court will be probing evidence. In the case of *Henry Wanyama Khaemba - Versus - Standard Chartered Bank Limited & Another* (2014) eKLR", the Court held that:- "That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res-judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded



quarrel with parties who resort to raising preliminary objections in improperly". Since a Preliminary Objection cannot be raised on disputed facts, it is clear that the question as whether or not the matter is Res Judicata, will require the probing of evidence, the Court finds and holds that what has been raised does not amount to a Preliminary Objection." [Emphasis ours] Based on the foregoing jurisprudence, we therefore humbly pray that this Honourable court dismisses the same with costs to the Applicant. 8. Be that as it may and if the court is persuaded that the questions raised by the Respondent are questions of law and not fact then it is our submission your Ladyship, that the pertinent question at hand raised by the Applicant in this matter is: - Whether the motion is res judicata'.

9. ON whether the motion is Res Judicata . The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act*, 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." We submit that the Doctrine of Res-Judicata as plead by the Respondent fails as the issues before the courts are dissimilar. We rely on the criteria for Res-Judicata to apply as held by the court in *Kennedy Mokuva Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR that: "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. 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." Although the parties in both suits are similar, it is the Applicant's assertion that the instant application is not Res Judicata as the issues raised in the said application are distinct and separate to those handled by the court in Employment and Labour Relations Court at Nairobi, Civil Appeal No. E 034 OF 2024. In the said application dated 29th May 2025, the Applicant seeks for leave to appeal out of time whilst in the appeal matter, the issue was whether the Appeal was a nullity for being filed out of time. [Attached hereto is the Ruling by Hon. Justice Keli Jemimah of the court in Employment and Labour Relations Court at Nairobi, Civil Appeal No. E 034 OF 2024; *Henry Karanja -vs- David Kangethe T/A Impress Communications Printers & Stationery*]

Decision

10. The crux of the Notice of Preliminary Objection is whether the application dated 29th May 2025 is resjudicata.
11. The applicant contended that the instant application is resjudicata on basis that similar issues were handled by the curt in Nairobi ELRC Civil Appeal No E34 OF 2025 between same parties. On other hand the applicant contended that the issues in the instant application are distinct and separate. Vide a Memorandum of Appeal dated 20th February 2024, the Appellant lodged the present appeal against the decision of the Judgment of Hon. B.M. Cheloti delivered on 7th November 2023 in Milimani ELRC Cause No 1694 of 2018. He sought the following orders:
 - a. The Appeal be allowed with costs to the Appellant.
 - b. The Judgment of Hon. B.M. Cheloti in Milimani ELRC Cause No. 1694 of 2018 and delivered on 7th November 2023 be set aside and this Honourable Court be pleased to determine the damages payable for the unlawful and unfair termination of the Appellant herein.



- c. Any further relief that this Court may deem fit to grant. In response to that Appeal, the Respondent filed a Notice of Preliminary Objection dated 10th January 2025. The grounds of the Notice of Preliminary Objection were-
- a. That the Appeal was filed after the expiry of the 30 days allowed under Section 79 (g) of the *Civil Procedure Act*.
 - b. That leave was not obtained to file the appeal out of time and hence the appeal is incurably defective and therefore the court lacks jurisdiction over the appeal.
12. The court upheld the objection in ruling dated 23rd May 2025 and struck out the Memorandum of Appeal dated 20th February 2024, and Record of Appeal dated 26th September 2024 for being filed out of time without leave of the court, with costs to the Respondent. The appellant is now before the court seeking extension of time to file appeal out of time.
13. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act*, 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.’ The court in its ruling of 23rd May 2025 struck off the appeal for having been filed out of time without leave of the court. In the instant application the application seeks to regularize its position by seeking leave of the court to file appeal out of time. The court holds that the application is not resjudicata as the issue of whether to grant leave to appeal out of time was not before the court in the ruling of 23rd May 2025 hence no decision of the court exists on the issue.
14. Consequently, the Court holds the application dated 29th May 2025 is not resjudicata. The Notice of Preliminary Objection dated 26th August 2025 is dismissed with costs to the applicant in the cause. The parties to take directions on the application dated 29th May 2025..
15. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD OF JANUARY, 2026.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – MS Mwangi h/b Maingi

Respondent – Ms Kimani h/b Gathoni

