

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
CIVIL MISC. APPLICATION NO. E032 OF 2023

IN THE MATTER OF ORDER 53 RULE (1) (2) OF THE CIVIL
PROCEDURE RULES AND SECTION 8 OF THE LAW REFORM ACT
CAP 26, LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY, THARAKA NITHI COUNTY
GOVERNMENT.....1ST RESPONDENT

THE CHIEF OFFICER FINANCE, THARAKA NITHI COUNTY
GOVERNMENT.....2ND RESPONDENT

THARAKA NITHI COUNTY
GOVERNMENT.....3RD RESPONDENT

THE CHIEF ACCOUNTANT, THARAKA NITHI
COUNTY GOVERNMENT.....4TH GOVERNMENT

AND

CICILIO MURANGO MWENDA T/A MURANGO MWENDA
& CO ADVOCATES.....EX-PARTE APPLICANT

RULING

1. The Ex-parte Applicant filed a Notice of Motion dated 26th March 2025 seeking the following orders: -

- i. Spent
- ii. That the honourable court be pleased to find that the (1) County Secretary, Tharaka Nithi County Government, (2) The Chief Officer Finance, Tharaka Nithi County Government and (3) the Chief Accountant, Tharaka Nithi County Government are in contempt of court order issued on 12th February 2024.
- iii. That the honourable court be pleased to commit the County Secretary, the Chief Officer, Finance and the Chief Accountant of Tharaka Nithi County Government to jail for a period of 6 months for contempt of court.

iv. That the Respondents be condemned to pay the costs of these contempt proceedings.

2. The Application was founded on the grounds set out on the face of the motion and on the supporting affidavit of Cicilio Murango Mwenda, the Ex-Parte Applicant. He deponed that in the year 2019, the 1st Respondent retained him to provide legal representation in Chuka HCC No. 1 of 2019 and also in the matter of Arbitration between the 1st Respondent and Terra Craft (K) Ltd.

3. He averred that he offered full legal representation up to the conclusion of the matter both in the high court and arbitration. That subsequently, he raised a fee note for settlement to the 1st Respondent who declined to pay.

4. He stated that he filed Advocate/Client Bill of costs against the 1st Respondent vide Misc. Application No. E004 of 2022 which was defended and subsequently taxed at Kshs. 14, 859,368. That the 1st Respondent did not challenge the taxation by way of reference before the High Court or through any other means.
5. The Applicant further stated that the 1st Respondent refused/failed to pay the taxed costs prompting the Ex-Parte Applicant to file Judicial Review seeking an order of mandamus to compel the County Secretary, Chief Finance Officer and the Chief Accountant, Tharaka Nithi County to pay the taxed costs. That on 12th February 2024, by consent of the parties, an order of mandamus was issued by this honourable court compelling the Respondents to pay the full

taxed costs within 30 days of the date of the order or they would be held in contempt of court.

6. He also averred that he extracted a formal order of mandamus and served it upon the three County officers and despite them being aware of the order, they have only paid Kshs. 6,500,000 leaving a balance of Kshs. 8,359,368. He added that the sums have accumulated an interest of 14% as ordered by the court and the outstanding sum was now Kshs. 10,439,679.

7. The Applicant urged that the Respondents' refusal to comply with the order of this court issued on 12th February 2024 is deliberate, intentional, willful and in contempt of court, for which they should be punished.

8. In response to the Application, the Respondents filed a Preliminary Objection raised on the following grounds: -

i. That this honorable court lacks jurisdiction to entertain the present application as the issues raised therein are res judicata having been conclusively determined by this court vide the ruling delivered on 22nd August 2024 by Hon. Justice L.W Gitari in Chuka High Court Misc. Civil Application No. E032 of 2023.

ii. That the instant application therefore constitutes a relitigation of matters already determined and is thus res judicata within the meaning of Section 7 of the Civil Procedure Act.

iii. That the Application is incompetent, an abuse of the court process and ought to be struck out with costs at the outset.

9. On 9th July 2025, the Respondents were granted leave to file a replying affidavit to the Application within 14 days. The Respondents did not file any replying affidavit. On the same day, the court directed that the Application be canvassed by way of written submissions with the P.O being addressed in their respective submissions.

10. The Applicant filed his written submissions dated 30th July 2025 while the Respondents filed their submissions dated 17th September 2025.

11. With respect to the P.O, the Respondents submitted that the Court of Appeal in **Independent Electoral and Boundaries Commission v Maina**

Kiai & 5 Others [2017] eKLR observed that *res judicata* applies not only to points that were determined but also to issues that ought to have been raised for determination. That in the instant case, the Motion dated 26th March 2025 meets the conditions set out in the above case as the issues were finally determined by the ruling of 22nd August 2024 which dismissed the earlier application. That therefore, the present application was *res judicata* and this honourable court was barred from reopening the matter.

12. The Respondent further submitted that the court is divested of jurisdiction by virtue of the matter being *res judicata* and the Application amounted to abuse of the court process. They relied on the cases of **Owners of the Motor Vessel “Lillian S” v**

Caltex Oil (Kenya) Ltd [1989] KLR 1, Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] KLR and Muchanga Investments Ltd v Safari Unlimited (Africa) Ltd & 2 Others [2009] eKLR.

13. The Applicant on the other hand submitted that the Respondents allege that the issue for consideration was dealt with by this court vide its ruling delivered on 22nd August 2024. He submitted that the ruling arose from a process of execution that had been commenced by the Applicant and the only issue for determination in the said ruling was whether or not County officials could be held individually liable for a debt owed by the County Government. That the court discussed whether the Applicant could proceed with that mode of execution

in view of the provisions of Section 21 (4) of the Government Proceedings Act and Order 29 of the Civil Procedure Act. He argued that the matter had not met the threshold for being res judicata as laid down in the following authorities: **Uhuru Highway Development Ltd V Central Bank of Kenya [1999] eKLR, Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR John Florence Maritime Services Ltd & Conken Cargo Fowarding Ltd v Cabinet Secretary Transport and Infrastructure & 2 Others [2021] KESC 39 (KLR).**

Analysis and determination

14. 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.”

15. 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.”

16. 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.

17. The persuasive English case of 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.”

18. The Respondents argue that the ruling of 22nd August 2024 conclusively addressed the enforceability of the mandamus order and the propriety of proceeding against the named County officials. A close look at the record shows that the Court in the earlier matter interrogated the question whether the County Secretary, the Chief Officer Finance and the Chief Accountant could be subjected to coercive processes in satisfaction of the decretal sum in light of the Government Proceedings Act and the applicable procedural framework. The Court ultimately dismissed the application then before it.

19. In dismissing the application, the court observed that it would be irregular to order Respondents to be committed to civil jail when the law prohibits their being held individually liable. The court further

directed that the Applicant should follow the laid down provisions of the law to have the monies paid to him.

20. The present Application seeks to cite the same officers for contempt for failure to comply fully with the order of mandamus issued on 12th February 2024. Although framed as a fresh contempt Motion, the gravamen of the complaint remains the same: enforcement of payment of the taxed costs through coercive measures directed at the same public officers.

21. As earlier as stated, the issue of compelling payment of the decretal amount through personal processes against the named county officials was canvassed and determined in the earlier proceedings. The Applicant had the opportunity at

that stage to advance all arguments concerning non-compliance, partial payment, and enforcement mechanisms. The fact that the present Motion is framed as one for contempt does not alter its essential character, which is to secure compliance through punitive sanctions against the same officers.

22. As earlier observed, *res judicata* extends not only to issues actually determined but also to those which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward. The Court cannot therefore permit a party to relitigate the same subject matter or issue couched differently.

23. The Applicant urges that partial payment and accrual of interest constitute new facts. However, the central obligation under the mandamus order and

payment of the taxed costs was the subject of the earlier determination. The appropriate recourse, if dissatisfied with that ruling, lay in review or appeal and not in instituting a new Application which effectively invites this Court to revisit its earlier decision outside the purview of review. The ruling of Gitari J. dated 22nd August 2024 is yet to be varied, set aside, reviewed or appealed.

24. In view of the foregoing, I am satisfied that the elements of *res judicata* have been established. The parties are the same; the court that delivered the ruling of 22nd August 2024 was competent; the issue of enforcing payment against the same officers was directly and substantially in issue; and the matter was determined.

25. Accordingly, I find that I do not have the jurisdiction to entertain the merits of the Notice of Motion dated 26th March 2025 by virtue of Section 7

of the Civil Procedure Act. The Preliminary Objection dated 9th July 2025 is thus upheld. The Notice of Motion dated 26th March 2025 is consequently dismissed but without costs.

26. As I pen off, I must observe that though the Application has failed on the basis of its being *res judicata*, this failure does not extinguish the Respondents' obligation to obey the subsisting order of *mandamus* and to fully satisfy the decree.

Orders accordingly

Ruling delivered, dated and signed at Chuka this 5th day of March, 2026.

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R. LAGAT-KORIR
JUDGE

Ruling delivered in the presence of Mr. Murango Mwenda for the Applicant and N/A for the Respondents. Muriuki (Court Assistant.)

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