



**Mbuva v Waichakehiri Farmers Co-operative Society Limited [Sued Through Chairman Robert Kimathi Marete] (Environment & Land Case 175 of 2002) [2025] KEELC 924 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 924 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 175 OF 2002**

**JO MBOYA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**JOSEPH MUTUA MBUVA ..... PLAINTIFF**

**AND**

**WAICHAKEHIRI FARMERS CO-OPERATIVE SOCIETY LIMITED [SUED THROUGH CHAIRMAN ROBERT KIMATHI MARETE] ..... RESPONDENT**

**RULING**

1. The Applicant has approached the court vide the Notice of Motion Application dated the 13<sup>th</sup> February, 2025 and wherein the Applicant has sought the following reliefs [verbatim]:
  - i. .... Spent
  - ii. Pending inter-parties hearing of the application, execution of the warrants of attachment of movable properties in execution of the decree for money issued on the 26<sup>th</sup> July, 2024 and the notice to show cause why warrant of arrest should not issue given on 29<sup>th</sup> January, 2021; be stayed.
  - iii. The firm of M/s Carlpeters Mbaabu & Co. Advocates of P.O Box 3295 – 60200 Meru, be granted leave to come on record and henceforth, represent the defendant in place of M/s Mwangi E.G & Co. Advocate of P.O Box 2436 – 60200 Meru.
  - iv. The warrants of attachment of movable properties in execution of the decree for money issued on the 26<sup>th</sup> July 2024 and the notice to show cause why warrant of arrest should not issue given on 29<sup>th</sup> January, 2021 be struck out and expunged from the court record
  - v. Costs of the Application be in the cause



2. The instant application is premised [anchored] on the various grounds which have been enumerated at the foot thereof. In addition, the application is supported by the affidavit of one Festus Muritani Rwere [hereinafter referred to as the Deponent] sworn on 13<sup>th</sup> February, 2025 and to which the deponent has annexed various annexures, including a copy of the minutes dated 9<sup>th</sup> March, 2020.
3. Upon being served with the subject application, the Defendant's counsel filed a Notice of Preliminary objection dated 18<sup>th</sup> February 2025; and wherein the Defendant has highlighted various grounds, alia inter that the application is barred by the doctrine of res-judicata and furthermore the same [application] constitutes an abuse of due process of the court.
4. The subject application came up for hearing on 25<sup>th</sup> February, 2025 whereupon the advocates for the parties covenanted to canvass the application by way of oral submissions. Suffice to state that the court adopted the agreement and thereafter allowed the application to be canvassed. Instructively, the submissions ventilated by the respective advocates are on record.
5. On behalf of the applicant, it was contended that the Defendant herein, namely; Robert Kimathi Marete had been sued in his official capacity as the chair person of the society. For good measure, it was posited that the Defendant was never sued in his personal capacity.
6. Furthermore, it was submitted that the cooperative society, which was being represented by Robert Kimathi Marete, held elections culminating into the election of new officials. In the regard, it was contended that one Festus Muritani Rwere, who has sworn the affidavit was duly elected as the chairperson of the society. To this end, learned counsel for the Applicant referenced the minutes dated 9<sup>th</sup> March, 2020.
7. Additionally, Learned counsel for the Applicant submitted that following the election of Festus Muritani Rwere as the chairperson of the society, the said Festus Muritani Rwere, is now the lawful representative of the society. Consequently, and in this regard, it was contended that the said Festus Muritani Rwere therefore has the capacity to make/ swear the affidavit on behalf of the Defendant
8. Moreover, it was submitted that the Defendant herein entered into a compromise with the Plaintiff/ Respondent, whereupon it was agreed that the Defendant shall not pursue the question of costs as against the Plaintiff/Respondent. Nevertheless, it was posited that despite the said agreement, the Defendant through Robert Marete; has since commenced the process of execution as against the Plaintiff.
9. According to learned counsel for the Applicant, the commencement of the execution against the Plaintiff/Respondent is irregular, unlawful and thus ought to be stopped. In any event, it was submitted that the execution process is a ploy by Robert Kimathi Marete [ former chair person] of the Defendant society to enrich himself.
10. Arising from the foregoing, learned counsel for the Applicant invited the court to find and hold that the application before hand is meritorious and thus ought to be allowed. For coherence, Learned Counsel for the Applicant implored the Court to grant/ allow the Application.
11. The Defendant raised two [2] salient issues. Firstly, learned counsel for the Defendant submitted that the question as to whether Festus Muritani Rwere was duly elected as the chairperson of the Defendant society had been canvassed before this court [differently constituted] and whereupon the Judge found and held that the impugned election was contested. In this regard, it was posited that the question as to whether Festus Muritani Rwere was the chairperson or not is res-judicata.



12. It was the further submissions by the learned counsel for the Defendants that the minutes dated 9/3/2020; and the attendant document being relied upon by the Applicant herein formed the basis of the ruling dated 9<sup>th</sup> October, 2024. For good measure, it was submitted that the ruling in question found and held that Festus Muritatin Rwere did not have the capacity to act for and on behalf of the society, namely, the Defendant herein.
13. Secondly, it was submitted that even though the Defendant is aware of the ruling dated 9<sup>th</sup> October, 2024, the Defendant has chosen to return to court in an endeavour to mislead the court and to procure orders, through the back-door. In this regard, it has been submitted that the conduct of the Applicant constitutes and amount[s] to an abuse of the court process.
14. Having reviewed the application before hand and upon taking into account the submissions by and on behalf of the parties, I come to the conclusion that the determination of the subject application turns on two [2] key issues, namely; whether the question of the capacity of Festus Muritani Rwere as the chairperson of the society had been determined/addressed by the court and if so, whether the issues is res- judicata; and whether the application herein is an abuse of the due process of the due process.
15. Regarding the question of res judicata, it is imperative to point out that the applicant herein had previously filed an application dated 14<sup>th</sup> August, 2024 and wherein the Applicant contended that same had been duly elected as the chairperson of the society. In addition, the applicant had posited that by virtue of his election as the chairperson same [applicant] had the capacity to take over the affairs of the Defendant, including joinder into the subject matter. Consequently, and to this end, the Applicant sought joinder into the suit as [sic] an interested party.
16. Nevertheless, the court considered the application under reference and thereafter rendered a ruling dated 9<sup>th</sup> October, 2024, wherein the learned Judge held that there was a dispute as pertains to who are the bona fide officials of the Defendant. In this regard, the learned Judge proceeded to and held that the applicant [Festus Muritani Rwere] lacked the requisite capacity to purport to act for the Defendant.
17. Additionally, the learned Judge also proceeded to and found that the dispute as to who are the bone fide officials of the society ought to be raised and canvassed before the Cooperative tribunal and only then would the issue be sorted out. Simply put, the learned Judge proceeded to and dismissed an application for joinder and stay of execution, which was being propagated by the Applicant herein.
18. Suffice to underscore that the ruling by the learned Judge was neither appealed against nor set aside. For good measure, the ruling remains in place. Moreover, learned counsel for the Applicant conceded and admitted as much.
19. Premised on the foregoing, it is evident that the issues be raised by the Applicant herein are issues that had previously been canvassed and determined by a court of concurrent jurisdiction. To this end, the said issues cannot be re-agitated afresh before this court.
20. Arising from the foregoing, I find and hold that the application beforehand, is barred by the doctrine of res- judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
21. Without belabouring the scope and extent of doctrine of res-judicata it suffices to cite and reference the decision of Supreme Court in the case of Kenya Commercial Bank Ltd vs Muiri Coffee Estate Ltd (2016) eKLR where the Supreme Court of Kenya highlighted the scope, import and extent of res-judicata.
22. For coherence, the court stated thus



- (52) 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. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.

Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

- (53) In *Silas Make Otuke v. Attorney-General & 3 Others*, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v. The AG of Trinidad and Tobago* (1991) LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".
- (54) 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.
- (55) 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.
- (56) 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 judgment 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."



23. The doctrine of res judicata was similarly revisited by the Supreme court [the apex Court] in the case of John Florence Maritime Services Ltd vs The Cabinet Secretary Transport, Infrastructure, Roads & Public Works [2021] eKLR where the court stated thus;

That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: 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 the form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and 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.’

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).

24. To my mind, the Applicant herein cannot re-clothe the same dispute and return to court, notwithstanding the fact that the same issue had previously been canvassed and adjudicated upon. Such an endeavour does not only constitute an abuse of the due process of the court, but is prohibited by the doctrine of res-judicata.
25. Arising from the foregoing analysis, I come to the conclusion that the issues raised and captured at the foot of the current application had hitherto been dealt with; and same are therefore barred by the Doctrine of Res Judicata.
26. Regarding the second issue, namely; the issue of abuse of the due process of the court, it is my humble position that a party cannot be allowed to litigate and re-litigate the same issue times without number. For coherence, the filing of the current application despite the decision of the court rendered on 9<sup>th</sup> October, 2024; amounts to an abuse of the due process of the court.
27. The concept of abuse of the due process of the court has been elaborated upon in various decisions of the Superior courts. In particular, the Supreme Court of Kenya elaborated upon the scope of the concept in the case of Rutongot Firm Ltd Vs Kenya Forest Services [2018] eKLR.
28. Other than the Supreme Court, the Court of Appeal has also spoken to the concept of abuse of the due process. Suffice it to cite and reference the decision in the Muchanga Investment Ltd Vs Safaris Africa [unlimited] Ltd [2009] eKLR. Pertinently, the filing of a multiplicity of applications/suits touching on the same question, was found to constitute an abuse of the due process of the court.
29. Before departing from this issue, it is also imperative to reference the decision in the case of Satya Sharma Vs the Director Public Prosecution [2019] eKLR; particularly paragraphs 24, 25 and 26 thereof. Notably, the Learned Judge [Honourable Justice Mativo, Judge, as he then was] highlighted various perspectives/ nuances of what constitutes abuse of the court process.
30. In my humble albeit considered view, the conduct as espoused by the Applicant and his Legal counsel, falls within the purview [ambit] of what constitutes abuse of the due process of court.



31. Worse still, the manner in which the application was being propagated despite learned counsel for the Applicant knowing of the existence of the ruling rendered on the 9<sup>th</sup> of October, 2024, makes the current application a classic case of abuse of the court process.
32. Quite clearly, such conduct must not be countenanced and/or nurtured by courts of law. On the contrary, such conduct ought to be frowned upon and to attract suitable punishment in accordance with the prescription of the law.

**Final Disposition:**

33. Having reviewed the application before hand and upon consideration of the twin issues, which were highlighted in the body of the ruling, I come to the conclusion that the current application is a classic case of abuse of the court process.
34. For good measure, Learned counsel for the Applicant should have had occasion to appraise, appreciate and internalise the import and tenor of Section 1 B of the *civil Procedure Act* Cap 21 Laws of Kenya.
35. Notwithstanding the foregoing, the final orders that commend themselves to the court are as hereunder;
  - i. The Application dated 13<sup>th</sup> February 2025 be and is hereby dismissed.
  - ii. Cost of the Application be and is hereby awarded to the Defendant
  - iii. The costs in terms of clause [ii] above shall be borne by the firm of M/s Calrpeters Mbaabu & Co Advocates taking into account the observations that this was a classic case of abuse of the court process.
  - iv. The costs in terms of clause [ii] above be and are hereby assessed and certified in the Kshs. 15,000 only and same shall be paid within 14 days.
  - v. In default to pay the costs in terms of clause [iv] above the Defendant shall be at liberty to execute.
36. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU ON THE 25<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of

Mr. Mutuma- Court Assistant.

Mr. Mawira for the Applicant

Mr. Karanja for the Defendant

No appearance for the Plaintiff/Respondent

