



**Gitonga v Kirinyaga Construction (K) Ltd (Cause 77 of 2015)  
[2022] KEELRC 3903 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3903 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE 77 OF 2015  
DKN MARETE, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**CHARLES NDERITU GITONGA ..... CLAIMANT**

**AND**

**KIRINYAGA CONSTRUCTION (K) LTD ..... RESPONDENT**

**RULING**

1. This is an application by way of a preliminary objection dated May 24, 2021. It comes out as follows;
  1. That the application is *res-judicata* previous ruling and judgment of the court.
2. The preliminary objection is referenced and in opposition to an application dated March 15, 2021 which comes out thus;
  - i. That this honourable court be pleased to find that the current application is extremely urgent and that the same may be heard *ex parte* in the 1st instance.
  - ii. That this honourable court be pleased to issue an order allowing the firm of Ng'ang'a Munene & Co Advocates to come on record on behalf of the applicant herein.
  - iii. That in addition to prayer number 2 above, this honourable court be pleased to issue temporary orders of stay against the decree herein pending the hearing and final determination of the application interparties herein.
  - iv. That this honourable court be pleased to set aside the judgment herein and all the consequential orders flowing therefrom and set this matter for hearing interparties.
  - v. That the costs of this application be in the cause.

It is grounded as follows;



1. That the applicant has a good case with high chances of success.
  2. That the applicant was not informed of the hearing of the main suit.
  3. That an attachment has already been carried out by the firm of Zasha Auctioneers and therefore the current threatened attachment by Hippo Auctioneers General Merchants is prejudicial.
  4. That it is in the interest of justice the orders sought be granted.
3. The claimant does not file replies to the preliminary objection or even application. He instead files written submission in support of his preliminary objection and also in opposition to the application by the defendant/respondent.

The applicant's case and submissions is that the respondent;

...the respondent has however failed to appreciate that the present application differs with the earlier applications in one major aspect in that it seeks an order of stay against the current execution proceedings by Hippo Auctioneers General Merchants on the basis that similar executions proceedings had already been carried out by Zasha Auctioneers.

It is the applicant's position that Zasha Auctioneers carried out attachment dated the October 28, 2019 and the motor vehicles KBT 446Q and KAM 133K, *inter-alia*, were attached and subsequently sold. No accounts on the amounts realized was ever given to the applicant and/or to court.

4. The issue of the new found auctioneer is new and would not be swept away under the guise of *res judicata*.

The claimant/applicant seeks to rely on article 50 of the [Constitution](#) 2010 provides as follows;

“every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

5. She seeks to rely on the authority of [Benjob Amalgamated Ltd & Muiri Coffee Estate Limited v Kenya Commercial Bank Ltd](#) (2006) eKLR, the court observed that;

“In any case a party who brings for the decision of the court matters which have already been determined can truly be said to be abusing the process of that court.” ..., the application before you is clearly an abuse of the court process and a waste of its precious judicial time, as the applicants/defendant has designed means of evading to settle decree and is going round the circles, making applications in the name of ventilating grievances, wherein the matters in dispute have been fully settled. ... the applicant/defendant is avoiding his obligations under the law of executing the decree thereby disobeying the orders of the court.

6. I find that a case of *res judicata* has been established on a balance of probabilities. The issues sought to be ventilated in this application were heard and determined in a prior application dated June 17, 2019. It would therefore be irregular to allow the applicants to litigate the same under any different auspices and guise.
7. I am therefore inclined to allow the preliminary objection and dismiss the application with orders that each party bears the costs of the same.

**DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.**



**D.K.Njagi Marete**

**JUDGE**

Appearances

Ms. Brenda Maina holding brief for Mr. Ng'ang'a instructed by Ng'ang'a Munene & Co. Advocates for the Applicant

Mr. Karweru instructed by Karweru & Co. Advocates for the Respondents.

