



**Mwaura v Republic (Criminal Case 5 of 2018)
[2023] KEHC 27313 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 5 OF 2018
SN MUTUKU, J
SEPTEMBER 26, 2023**

BETWEEN

DENNIS KIHARA MWAURA APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

1. This Ruling relates to the Notice of Motion brought by Dennis Kihara Mwaura, the Applicant, seeking to have the order made in respect of bond terms in this case reviewed and varied to the extent that the passport deposited to the court be released to him.
2. The grounds in support of the Notice of Motion are found on the face of it and in the supporting affidavit sworn by him on May 16, 2023. He has stated that he is a Flight Attendant employed by Air Traffic Ltd based at Wilson Airport, Nairobi, and that in the course of his employment, it is mandatory requirement for him to have his Passport No. A20xxxxx because his duties involve frequent flying to foreign countries; that the continued detention by the court of his passport is jeopardizing his livelihood; that further detention of his passport may cause him to lose his employment; that he is a Kenya citizen and not a flight risk; that he has been faithful to the terms and conditions of bail/bond and that this court should strike a balance between the right of the accused and the right to liberty of the Applicant who is presumed innocent until the contrary is proved and allow the Applicant to keep the fabric of his life intact by maintaining employment, family and community ties.
3. The Director of Public Prosecutions (DPP) raised a Preliminary Objection (PO) on the point of law that this application is *res judicata* in that the Applicant had filed a similar application dated June 24, 2019 which was heard and determined and therefore this court is *functus officio*.
4. This court directed that both the PO and the Notice of Motion be canvassed simultaneously through written submissions. Both parties have filed their submissions.



5. The Applicant filed his submissions on July 24, 2023. The Applicant has argued that this matter is not *res judicata* for the simple reason that the court has not pronounced itself on the same issues in the earlier application. He argued that the PO has no merit and ought to be dismissed. He has urged that he is a law-abiding citizen who is protected by the law; that he has a right to earn a living; that he is innocent until proven guilty; that he has been attending court sessions faithfully and has no warrant of arrest.
6. The Applicant has relied on *Mukisa Biscuits Manufacturing Limited v West End Distributors* [1969] EA 696 where the court stated as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limit.”
7. The Respondent’s submissions are dated July 6, 2023. The Respondent has raised two issues; that the application by the Applicant is *res judicata* for the reason that the Applicant had filed a similar application dated June 24, 2019 which was heard and determined by Hon. Mr. Justice Mwita who dismissed it. The Respondent further argued that this court is *functus officio* for reasons that the first similar application having been heard and determined by Justice Mwita who is of equal jurisdiction to this court, then this court cannot hear and determine this application.
8. The Respondent has relied on *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*- [2017] eKLR where the court stated that:

“[F]or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

 - (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
9. The Respondent also cited *Raila Odinga & 2 others v IEBC & others* [2013] eKLR where the Supreme cited with approval an article by Daniel Malan Pretorius, in *“The Origins of functus officio Doctrine, with Specific Reference to its Application in Administrative Law”*, [2005] 122 SALJ 832:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers, and, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body of functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



10. I have considered this matter. To put the issues being canvassed before me into perspective, I have taken time to read the court file records. I have noted that the accused made a bail application which was heard before Justice R. Nyakundi on April 4, 2018. From the record a ruling was scheduled for April 13, 2018 on the issue of bail. However, I have not seen any ruling in the court file.
11. The record further shows that on July 3, 2018, Mr. Makori for the 2nd accused person and Ms. Kemunto for the 4th accused person made application for review of bond terms before Hon Justice R. Nyakundi, who on July 11, 2018 stated as follows:

“I have considered the review application on bond terms in favour of the accused persons. The accused persons had argued the initial application which was declined on grounds of interference of witnesses. However, the initial witnesses have since testified. I found no compelling reasons to deny the accused bail at this stage. In this regard I direct that each of the accused to be released on bond of Kshs. 1.5 million with a surety each of identical amount to deposit verifiable security documents..... The accused persons, 1,4 and 5 do deposit their passports with the registrar of the High Court. Their travel out of the country is denied and is sanctioned by this court.”
12. I have also noted that the Applicant filed an application through a Notice of motion dated June 24, 2019 seeking for orders that the bond terms of Criminal Case No. 5 of 2018 be reviewed and varied to the extent that the passport so deposited be released to the Applicant’s custody. The matter was heard on August 16, 2019 before Justice. R. Nyakundi. The court made the following directions that:

“I am made to understand that counsel on the application is not the one representing the accused at the main hearing before this court. Then, indeed, can the accused person be said to be approaching this court with good faith?

The integrity of the record of proceedings must be indispensable at all stages of the trial. Once the accused signs out legal representation this court would make an entry to deal with the notice of motion. I so accordingly order.”
13. I have not come across any ruling on this application. The Respondent did not attach any ruling on the Notice of Motion dated June 24, 2019, if there is such a ruling. Given that this court is not privy to such a ruling and given that there is no such ruling in the court file, the only conclusion I can make is that the earlier application was not determined. The result of that conclusion is that the current application is not *res judicata*.
14. Other than the argument that this application is *res judicata* and that this court is *functus officio*, which I find not to be the case, I have not been provided with any material to the effect that the applicant is a flight risk. I will therefore allow the application under consideration. The passport held by this court, belonging to Dennis Kihara Mwaura shall be released to the Applicant forthwith. The other bond terms remain with a caution that the applicant shall attend court without fail for the remainder of the trial.
15. Orders shall be issued accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH SEPTEMBER 2023.

S. N. MUTUKU

JUDGE

