



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 148 OF 2011

CLESOI HOLDINGS LIMITED.....PLAINTIFF

VERSUS

PRIME BANK LIMITED.....DEFENDANT

RULING

1. On 30th July, 2020, the court (Hon. Lady Justice G. L. Nzioka) delivered a judgment in which it dismissed the Plaintiff's suit with costs to the Defendant.

2. Consequently, vide a Notice of Motion dated 1st October, 2020, brought under **Sections 1A, 1B, 3A, 63(c), 75(1) & 95** of the **Civil Procedure Act** and **Order 42 Rule 6, Order 50 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law, the Plaintiff sought the following main orders from this court:

i. That pending inter partes hearing and determination of this application this honorable court be pleased to grant a temporary order of injunction restraining the Defendant whether by themselves, their employees, servant, agents or auctioneers from doing any of the following acts that is to say, evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever competing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R. No. 209/10830/5.

ii. That pending the filing, hearing and determination of an application under Rule 5(2)(b) of the Court of Appeal Rules in the Court of Appeal or for such reasonable time to enable the Plaintiff prosecute their Application under Rule 5(2)(b) of the Court of Appeal Rules, this honorable court be pleased to grant a temporary order of injunction restraining the Defendant whether by themselves, their employees, servant, agents or auctioneers from doing any of the following acts that is to say, evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever competing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R. No. 209/10830/5.

iii. That in the alternative to prayer 2 and 3, this honorable court be pleased to grant a temporary order of injunction restraining the Defendant whether by themselves, their employees, servant, agents or auctioneers from doing any of the following acts that is to say, evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever competing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R. No. 209/10830/5 for another 60 days or such time as it may deem fit to enable the Plaintiff to file and prosecute an appeal against the judgment of this Honourable Court delivered on the 31st July, 2020.

iv. That costs of this application be in the cause.

3. The application is premised on the grounds on the face of it and supported with four Affidavits sworn by **NIPTI RAJESH SHAH**, a director and shareholder of the Plaintiff, on different dates. In the supporting Affidavit sworn on the date of the application, she averred that the Court by its Judgment dated and delivered virtually on 31st July, 2020 dismissed the Plaintiffs case with costs and proceeded to vacate the injunctive orders obtained in the suit sometime in 2011 against the exercise of statutory power of sale that was intended by the Defendant. She stated that the Plaintiff was aggrieved by said decision and had already commenced the process of preferring an appeal against the same by lodging a Notice of Appeal. She also averred that the Plaintiff's advocates sought certified copies of the judgment, decree and proceedings from the court to enable them file the intended appeal as well as an Application for injunction under **Rule 5(2) (b)** of the **Court of Appeal Rules**, in the Court of Appeal.

4. It was deposed that upon dismissing the Plaintiff's suit, the court, upon application by the Plaintiff's Advocates, granted the Plaintiff 45 days injunctive orders against the Defendant to enable the Plaintiff secure the relevant documents for purposes of moving the Court of Appeal. She stated that in granting the 45 days orders, the court indicated that the Plaintiff will be at liberty to apply for extension if need arises after the expiry of that period. She contended that the need has arisen since the Plaintiff is yet to be provided with the cardinal documents requested from Court and particularly a copy of the judgment which is mandatory in lodging an application for injunction in the Court of Appeal and drafting and filing both the Memorandum of Appeal and the Record of Appeal.

5. It was contended that the Defendant moved with haste upon the expiry of the 45 days and instructed auctioneers, who have already visited the suit property, to sell it. It was also deposed that although the intended Appeal and the Application for injunction in the Court of Appeal are arguable, the suit property is at imminent risk of being taken out of the jurisdiction of the court which will render both nugatory unless the court grant's a limited conservatory order.

6. Further, she deposed that despite dismissing the suit, this court has jurisdiction and powers to grant the orders sought. It was also stated that the Plaintiff will be prejudiced irreparably should the suit property be sold before the intended appeal and application for injunction in the Court of Appeal are heard and determined. Finally, she deposed that this application has been brought without undue delay. It was thus her view that it is in the interests of justice that the orders sought be granted.

7. In the further Affidavit sworn on 19th November, 2020 by **NIPTI RAJESH SHAH**, she averred that the Plaintiff's advocates were still unable to file the Record of Appeal and Application under **Rule 5(2) (b)** in the Court of Appeal since they were yet to receive copies of the proceedings and certified copy of the judgment from the court. She stated that whilst the same was in progress, the Defendant went ahead and instructed the firm of Garam Auctioneers to sell the suit property and the firm issued them with a notification of sale. It was her view that there is therefore real and imminent threat to the suit property being taken out of the jurisdiction of this court either by way of private treaty which may require no further notification or auction scheduled for 19th January, 2021.

8. She noted that taking into consideration the current court vacation, it is unlikely that the intended application of the Court of Appeal will have been considered by the time the scheduled auction takes place. She reiterated that the purpose for which the 45 days injunctive orders were issued will be defeated if this application is not allowed and their constitutional right of appeal will be taken away, if the intended sale of the suit property is not stopped.

9. In opposition to the application, **ALKA SHAHI**, the Defendant's Assistant General Manager-Credit swore a Replying Affidavit on 5th October, 2020. He deposed that the Plaintiff's application has no basis in law and is already spent in any event since the Plaintiff was granted stay for a period of 45 days upon delivery of the judgment on 30th July, 2020 to enable its further action in the Court of Appeal. He deposed that time for the Plaintiff to file the injunction application and appeal in the Court of Appeal ran from 30th July, 2020 to 15th September, 2020 but the Plaintiff failed to take any step in that regard for a period of over 60 days claiming that its Advocates were unable to obtain a copy of the judgment. It was averred that the Plaintiff's delay is completely inexcusable since the judgment has been readily available online in the Kenya Law Reports Website. In the premises, he averred that the Plaintiff is guilty of undue and inexplicable delay and is therefore not entitled to grant of any injunctive orders.

10. Further, he deposed that the High Court has no jurisdiction to grant any injunction pending the filing of an application in the Court of Appeal. He stated that this court is now *functus officio* and cannot purport to exercise jurisdiction on behalf of the Court of Appeal and that if the Application herein is granted, it shall amount to reviewing and/or upsetting the orders granted by the court on 30th July, 2020.

11. It was further deposed that the application is an abuse of the court process by the Plaintiff. It was averred that the Plaintiff obtained an injunction pending the hearing and determination of the suit on 15th March, 2012 but the same was vacated when Justice E. K. Ogolla dismissed the suit for lack of prosecution on 30th October, 2014. Subsequently, and after a desperate plea by the Plaintiff, the suit and injunction orders were reinstated on 19th December, 2014. Thereafter, the suit was heard and determined by the Court on 30th July, 2020.

12. He deposed that since March 2012, the Defendant has been restrained from exercising its statutory power of sale and the Plaintiff who has been enjoying the injunctive orders has deliberately slowed down conclusion of the proceedings herein. He stated that there is no proper and/or justifiable reason why the Plaintiff has not filed its application in the Court of Appeal from 30th July, 2020 yet filings to the Court of Appeal are taking place online and therefore there is no impediment to justify the Plaintiff's inaction.

13. Additionally, it was averred that the Plaintiff and the borrower have not repaid anything in settlement of the loan facility since 2011 and the balance outstanding as at 31st December, 2013 was Kshs. 148,118,078.60/= . It was deposed that the grant of any further orders shall amount to favouring the Plaintiff with injunction orders in perpetuity against the Statutory Power of Sale of the Defendant which has long crystallized. He deposed that the Defendant advanced the borrower money and since the Plaintiff and the borrower defaulted, it is now entitled to proceed to sell Plaintiff's charged property. He also noted that if the injunction orders are granted, the same would seriously prejudice the Defendant because the debt is increasing while the value of the properties in the market is no longer rising due to Covid-19 pandemic and other prevailing economic issues.

14. He stated that in any case, the Defendant is a large Bank with an extensive capital base and duly compliant with the CBK requirements hence can easily meet any loss or damage that the Plaintiff may suffer if its appeal, which is very weak and unsupported, succeeds. It was also deposed that in any event, the Plaintiff has not offered any security as required under **Order 42** of the **Civil Procedure Rules**. In the premises, he urged the court to decline the Plaintiff's application.

15. In the 2nd Further Affidavit of **NIPTI RAJESH SHAH** sworn on 3rd December, 2020, the Plaintiff confirmed that it had received the certified copy of the judgment on the same date. In the 3rd Further Affidavit of **NIPTI RAJESH SHAH** sworn on 8th December, 2020, the Plaintiff confirmed that it was in the process of lodging the intended appeal and application for injunction in the Court of Appeal.

Plaintiff/Applicant's submissions

16. The Application was canvassed by way of written submissions.

17. In its written submissions dated 8th November, 2020, the Plaintiff reiterated the contents of its application and Affidavits. Additionally, it submitted that due to reasons which the court registry cited were associated with the Covid-19 pandemic, the documents required to lodge the appeal and application in the Court of Appeal were only obtained on 1st December, 2020. The Plaintiff reiterated that whereas it is now in the process of lodging the Appeal, it seeks injunctive orders pending the filing and determination of its application under **Rule 5(2) (b) of the Court of Appeal Rules** since it is unlikely that the said application will have been heard and determined before the scheduled auction, in view of the current court vacation.

18. On Jurisdiction, the Plaintiff submitted that under **Article 159 (2) (d) of the Constitution**, this court is mandated to consider the merits of this application and deliver substantive justice to the parties irrespective of the procedural technicality. It was further contended that **Sections 3, 3A and 63 (e) of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, 2010** also grants this court a wide discretion to grant interlocutory orders as may appear to be just and convenient. The Plaintiff also contended that a stay of execution or injunction pending Appeal must be sought for in an application in the court that made the decision sought to be appealed against or in the Court where the Appeal is filed.

19. As to whether or not the orders sought should be granted, the Plaintiff referred the court to the case of **Patricia Njeri & 3 Others vs. National Museum of Kenya (2004) eKLR** where Visram, J (as he then was) set down the conditions necessary for the grant of injunction pending appeal. The Plaintiff also referred the court to the conditions precedent to grant of stay of execution pending appeal as set out under **Order 40 Rule 6 of the Civil Procedure Rules**.

20. It contended that its appeal is arguable as demonstrated by the grounds contained in its draft Memorandum of Appeal. It submitted that from the judgment, it is clear that a sum in excess of Kshs. 170 million in fixed deposit is unaccounted for, which amount formed part of security together with the suit property. It argued that the Defendant unilaterally changed the terms of the facility without authorization from the Plaintiff thus effectively discharging the Plaintiff as a guarantor.

21. It was further submitted that the choice of forum has been necessitated by the prevailing circumstances brought by the Covid-19 pandemic since it is clear from the record that the Applicant was only able to get the mandatory certified documents more than 4 months after the judgment was delivered. In this respect, the Plaintiff relied on the case of **Julius Kerika v Wilson Kaata [2019] eKLR**, where the court granted the Applicant therein a stay of execution of judgment because of a delay in being provided with a copy of typed judgment to enable him file his appeal.

22. The Plaintiff also relied on the case of **Kamau Muchuha v The Ripples Ltd Civil App. No 186 of 1992** where the court held that in an application for injunction pending Appeal, the court does not have to decide whether the judge was right or wrong since the determination will be made at the hearing of the appeal itself. It submitted that at this juncture, the Court is only supposed to determine whether the Plaintiff has a reasonable argument and that the appeal is not frivolous.

23. The Plaintiff further submitted that it was evident from the grounds contained in the Memorandum of Appeal that its appeal is arguable. It noted that arguable points need not be points that will succeed but those that are worth ventilation by the court.

24. On the nugatory aspect, the Plaintiff submitted that if the Defendant exercises its statutory power of sale, the substratum of the appeal will be lost and this will render the appeal nugatory and a mere academic exercise. It was contended that the Defendant's contention that the Plaintiff can be compensated with damages does not hold since there was no claim for damages in the trial court hence the Plaintiff cannot be remedied *in vacuo*. Reliance was placed on the case of **George Otieno Gache & Another v Judith Akinyi Bonyo & 5 others [2017] eKLR**, where the court set out the test for determining whether an appeal will be rendered nugatory.

25. It also cited the case of **Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others (Civil Application No. 256 of 2013)**, in which the Court expressed the purpose of the requirement that a successful appeal should not be rendered nugatory to be:-

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

26. As to whether the Respondent will be prejudiced by the grant of the injunctive orders, the Plaintiff submitted that since the Defendant still holds the title documents to the suit property and has a charge over the suit property, it can deal with it as it deems fit in case the Appeal does not succeed. It submitted that on the other hand, its right of appeal will be prejudiced if the sale is allowed to proceed and it will be impossible for it to be reinstated to the same position it was before the sale.

27. The Plaintiff also submitted that the impugned judgment is not a monetary judgment to warrant demand for deposit of security and that in any case, the suit property remains to be security until a discharge or sale is effected. It contended that granting the orders sought will safeguard the interests of both parties and relied on the case of **George Otieno Gache & another v Judith Akinyi Bonyo & 5 others [2017] eKLR** in this regard.

28. The Plaintiff concluded that the orders sought are not an extension of the orders granted before the hearing of the suit which were granted on merit in any case. It reiterated that it is only praying for opportunity to ventilate its appeal without the same being rendered nugatory before it is heard.

Defendant/Respondent's submissions

29. In the Defendant's written submissions dated 15th December, 2020, it was submitted that the Plaintiff's application is baseless and cannot be allowed by the court on account that it seeks a stay of a negative order. The Defendant submitted that the court in its judgment dated 30th July, 2020 dismissed the suit with costs to the Defendant which is an order not capable of being stayed. In that regard, it relied on the case of **Western College of Arts and Applied Sciences v Oranga & Others [1976] KLR 63.**

30. It was the Defendant's submission that the application has no basis in law as the High Court lacks jurisdiction to grant an injunction pending the filing of an application in the Court of Appeal. It was submitted that the court exhausted its jurisdiction on 30th July, 2020 after delivery of judgment when it granted the Plaintiff a stay of execution of 45 days to file an appeal in the Court of Appeal. In the Defendant's view, the court became *functus officio* thereafter and cannot be asked to exercise jurisdiction on behalf of the Court of Appeal in granting the orders sought. The Defendant also noted that the present Application is already spent and is *res judicata*.

31. Further, it was the Defendant's submission that the Plaintiff's application did not meet the requirements for the grant of an injunction pending appeal as set out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** and the case of **Elena Doudolova Korir v Kenyatta University [2014] eKLR** was cited to buttress the submission.

32. It was argued that the Plaintiff has not placed any material before this court to demonstrate that it stands to suffer irreparable damage if the orders sought are not granted. It was submitted that when the Plaintiff and the borrower agreed to use the suit property as security for the loan facility, they made the property a commercial commodity and were well aware of the likelihood of the property being sold in the event of default. In this regard, the Defendant relied on the case of **David Mburu Githere & Anor v Jamii Bora Bank LIMITED [2017] eKLR.**

33. The Defendant further submitted that there was an inordinate delay in filing the present application. It argued that the Plaintiff filed the Application on 1st October, 2020 whereas the judgment was delivered and stay orders issued on 30th July, 2020. In its view, no plausible explanation has been given for the delay and the failure to obtain typed proceedings does not refrain the Applicant from filing the application as proceedings are not a necessity in the application. It argued that the Plaintiff has not been prudent or keen in following up with the court to ensure the timely filing of the Record of Appeal.

34. Further, the Defendant stated that the Plaintiff has not offered any security for due performance and relied on the case of **Mrao Limited v First American Bank of Kenya Ltd & 2 Others** in this respect. In its view therefore, the application is not merited and ought to be dismissed.

Analysis and Determination

35. Upon considering the Notice of Motion, the Plaintiff's Affidavits in support thereof, the Defendant's Replying Affidavit thereto and the parties' respective written submissions, I find that the only issue for determination is whether the orders sought in the application dated 1st October, 2020 are merited.

36. It is not in dispute that the Plaintiff's case was heard and dismissed by the Court on 30th July, 2020. Aggrieved by that decision, the Plaintiff lodged a Notice of Appeal against the said decision on 10th August, 2020 and confirmed that it is in the process of lodging its Appeal against the judgment and Application under **Rule 5(2) (b)** of the **Court of Appeal Rules**, in the Court of Appeal. The Plaintiff now seeks to be granted an order of injunction to restrain the Defendant from dealing adversely with the suit property to its prejudice pending the filing, hearing and determination of the said application as well as the intended appeal.

37. The application is expressed to be brought pursuant to, *inter alia*, the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** which states as follows:

“6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless

a) the Court is satisfied that substantial loss may result to the applicant unless the Order is made and that the application has been made without unreasonable delay; and

b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in sub-rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) for the purposes of this rule an appeal to the Court of appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with. (emphasis added).

38. It is clearly evident that the above provision and particularly **Rule 6(6)** only envisages the grant of an injunction pending appeal by the High Court when the Court is exercising its appellate jurisdiction. In this case, the merits of the Plaintiff's case were determined by this court in the judgment of 30th July, 2020 but the Plaintiff opted to come back to this same court to seek for injunction pending appeal which was improper. In the case of **Bartholomew Mwanyungu & 3 others v Florence Dean Karimi [2019] eKLR**, the court, when confronted with a similar application brought under the provisions of **Order 42 Rule 6**, stated thus:

“It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this Court given on 18th April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant.”

39. The reasons as to why a party whom judgment has been entered against is estopped from seeking an injunction pending appeal in the same court were explained in the case of **Chembe Katana Changi v Ministry For Lands & Settlement & 4 others [2014] eKLR** where the court pronounced itself as follows when dealing with a similar application;

“14. There is no provision in the Civil Procedure Rules allowing a party against whom Judgment has been entered to file an Application for injunction pending appeal.

15. The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial court to grant to a party an injunction after delivery of Judgment considering that one of the principles that must be established by an Applicant in such an Application is to show that he has a prima facie case with chances of success.

16. Once a Judgment has been delivered, there will be no pending suit. It therefore follows that a party challenging a Judgment cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal.” (emphasis added).

40. I cannot add more save to emphasize that I entirely concur with the above pronouncement. It is trite that an injunction is granted for purposes of protecting a subject matter awaiting the determination of the main suit. Once the final judgment in the suit is pronounced against a party in whose favour the injunctive orders were issued, the injunction ceases to operate. Thus, the same court that issued the injunction whilst the suit was pending cannot undo its judgment by issuing a second injunction after the judgment.

41. To that end, not even this court's inherent jurisdiction under **Section 1A, 1B and 3A** of the **Civil Procedure Act** can salvage the application presented by the Plaintiff. The injunctive orders sought can only be granted by the Court of Appeal in which the Plaintiff has already lodged a Notice of Appeal. Indeed, **Rule 5(2) (b)** of the **Court of Appeal Rules** empowers the Court of Appeal to grant an injunction in civil proceedings, on such terms as the court may think just, where a Notice of Appeal has been lodged in accordance with **Rule 75** of the said Rules, so long as the requisite conditions are met.

42. Since this court is by law estopped from considering the Plaintiff's application, it will not dwell on the lengthy submissions presented by the parties herein regarding whether or not the Plaintiff has met the requisite conditions for the grant of an injunction pending appeal.

43. Further, I am in agreement with the Defendant's submissions that this court became *functus officio* upon determining the Plaintiff's case to finality and as such, it cannot revisit issues that it had already pronounced itself on. The court's jurisdiction at this juncture can only be invoked in situations which may be incidental to the judgment or decree such as on an application for stay of execution. In so holding, I align myself with the decision in the case of **Chembe Katana Changi[supra]** where the court held:

“It is true that once the trial court decides the suit on merit, it becomes functus officio. The trial cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial court sitting on its own appeal which is improper. The only occasion that the trial court can deal with a matter it has already heard and determined is during the execution process or when an Application for review of the Judgment has been filed pursuant to the provisions of Order 45 or when an Application for stay of execution pending appeal has been filed pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules.”

44. Similarly, in **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR**, the court stated as follows:

“The doctrine of functus officio was well stated by the Court of Appeal in Telcom Kenya Ltd -vs- John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd. (2014 e KLR that:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon—

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in

re-St Nazaire Co, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.---"

.....the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only."

45. In the instant case therefore, an application for stay of execution would have been better suited had the court, in its judgment of 30th July, 2020, issued an order that is capable of being executed. However, as it stands, the judgment only dismissed the Plaintiff's suit and thus a stay of the same would also be inconsequential as the judgment only took back the parties to the position they were in before the suit was filed.

46. The Defendant further submitted that the application is also *Res Judicata*. However, I wish to point out that the principle of *Res Judicata* is not applicable in this case as it relates to a situation where there are two suits. That is to say that the issues in a current suit must have been directly and substantially in issue in a previous suit, between the same parties, or litigating under the same title, and the issues must have been determined to finality by a court of competent jurisdiction. In this instance, there is only one suit which has already been determined and thus the applicable principle is *functus officio* which I have pronounced myself on.

Conclusion

47. The upshot of my findings is that the Plaintiff's Notice of Motion dated 1st October, 2020 lacks merit. I hereby dismiss it with costs to the Defendant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH JANUARY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Mirie for the Plaintiff/Applicant.*
2. *Mr. Mwangi for the Defendant/Respondent.*